No. 98-223-CSY Title: Florida, Petitioner
v.
Tyvessel Tyvorus White

Docketed: August 3, 1998 Court: Supreme Court of Florida

Entry	Date	Proceedings and Orders
	Aug 3 1998	Petition for writ of certiorari filed. (Response due September 2, 1998)
	Aug 3 1998	Application (A98-107) for a stay of state court proceedings and issuance of the mandate, submitted to Justice Kennedy.
	Aug 7 1998	(A98-107) Stay granted by Justice Kennedy pending receipt of a response, due August 14, 1998 and further order.
	Aug 11 1998	Response to application (A98-107) filed by Tyvessel White.
	Aug 13 1998	Application (A98-107) denied by Justice Kennedy.
	Aug 13 1998	Waiver of right of respondent Tyvessel Tyvorus White to respond filed.
	Aug 19 1998	DISTRIBUTED. September 28, 1998
	Sep 16 1998	Response requested.
	Oct 14 1998	Brief of respondent Tyvessel Tyvorus White in opposition filed.
	Oct 14 1998	Motion of respondent for leave to proceed in forma pauperis filed.
	Oct 28 1998	REDISTRIBUTED. November 13, 1998
	Nov 16 1998	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Nov 16 1998	Petition GRANTED. SET FOR ARGUMENT March 23, 1999. **********
	Dec 16 1998	Order extending time to file brief of petitioner on the merits until January 11, 1999.
	Jan 11 1999	Brief amicus curiae of United States filed.
	Jan 11 1999	Brief amici curiae of Arkansas, et al. filed.
	Jan 11 1999	Brief of petitioner Florida filed.
	Jan 11 1999	Joint appendix filed.
	Feb 8 1999	Brief of respondent Tyvessel Tyvorus White filed.
	Feb 10 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Feb 11 1999	CIRCULATED.
	Feb 12 1999	Record filed.
	Feb 17 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 1 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 1 1999	Record filed.
	Mar 5 1999	Reply brief of petitioner Florida filed.
	Mar 23 1999	ARGUED.

Case No. _____

IN THE UNITED STATES SUPREME COURT
October Term 1997

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A WARRANT IS REQUIRED BY THE FOURTH AMENDMENT TO SEIZE A MOTOR VEHICLE UNDER A CONTRABAND FORFEITURE ACT AND FOR SUBSEQUENT SEARCH OF SAID VEHICLE CONFLICTS WITH DECISIONS OF THE COURT IN CARROLL V. UNITED STATES, CALERO-TOLEDO V. PEARSON YACHT LEASING, AND COOPER V. CALIFORNIA, THAT OF THE ELEVENTH CIRCUIT IN UNITED STATES V. VALDES AND THE MAJORITY OF STATE COURTS ADDRESSING THIS ISSUE?

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CASE NO. _____

IN THE UNITED STATES SUPREME COURT
October Term 1997

STATE OF FLORIDA,

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v.

TYVESSEL TYVORUS WHITE,

Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as White v. State, 710 So.2d 949 (Fla. 1998).

Petitioner's Appendix contains the opinion of the Florida Supreme Court below, Case No. 88,813, (A 1-22), as well as the court's order denying rehearing. (A 23). The appendix further contains the opinion of the Florida First District Court of Appeal, White v. State, 680 So.2d 550 (Fla. 1st DCA 1996). (A 24-45). The parties will be referred to as they appear before this Court or as they stood in the court(s) below[1].

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[1]The symbol "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The decision below was entered on February 26, 1998. Petitioner's Motion for Rehearing was denied June 1, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. - This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The material facts, as set out by the Florida Supreme Court in the body of its decision are as follows:

> On October 14, 1993, petitioner Tyvessel Tyvorous White (White) was arrested at his place of employment on charges unrelated to this case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been use several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture by the government. After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.
>
> Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine, and subsequently the trial court formally denied

White's objection and motion to suppress the cocaine evidence.

On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993)(hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures.

(A 2-3, footnotes deleted)

The Florida Supreme Court held that on these facts, the District Court's opinion was in error and adopted the out-of-circuit decision in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992). This minority view, which is contrary to the controlling authority of the Eleventh Circuit, provides that a warrant was required under the Fourth Amendment for seizure and search of Respondent's vehicle.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FLORIDA SUPREME COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THE COURT THAT NO WARRANT IS REQUIRED UNDER THE FOURTH AMENDMENT TO SEIZE, SEARCH AND FORFEIT A MOTOR VEHICLE PURSUANT TO A CIVIL FORFEITURE ACT, AND DIRECTLY CONFLICTS AS WELL WITH DECISIONS OF THE ELEVENTH CIRCUIT AND THE MAJORITY OF STATE COURTS ON THIS POINT. THEREFORE, THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE FLORIDA SUPREME COURT AND THOSE OF THE COURT THE ELEVENTH CIRCUIT, AND THE MAJORITY OF STATE COURTS.

The decision of the Florida Supreme Court holding that a warrant is required by the Fourth Amendment for seizure of an automobile under a contraband forfeiture statute is contrary to controlling precedent of the Court and that of the Eleventh Circuit, the controlling federal circuit for Florida[2], as well as the majority of state courts addressing this issue.

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[2]Under the Florida Constitution there cannot be an independent and adequate state ground to support the decision of the Florida Supreme Court. Under Art. I, § 12 of the Florida Constitution, Fourth Amendment issues in the Florida courts must be decided in conformity with decisions of this court, and the Florida courts can afford no higher level of Fourth Amendment protection. Bernie v. State, 524 So.2d 988, 990-991 (Fla. 1988). The Florida Supreme Court explicitly recognized this constraint in its decision below: "In 1982, article I, section 12 of the Florida Constitution was amended to add what has become known as the conformity clause because 'we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and provide no greater protection than those interpretations.'" (A 3, n.3). Therefore, this Court's decisions interpreting the Fourth Amendment are conclusive on the issue presented; definitionally there is no independent and adequate state ground to support the decision below. See Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996).

In reaching this contrary decision, the state court ignored well settled doctrine of the Court expressed in cases such as Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), and Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). The state court rejected as well the majority view of the Federal Circuits on this issue, expressed in the Eleventh Circuit's decision in United States v. Valdes[3], 876 F.2d 1554 (11th Cir. 1989), and opted instead for the minority view, as set out in the Second Circuit's decision in United States v. Lasanta[4], 978 F.2d 1300 (2d Cir. 1992).

As a result, there now exists in Florida the inherently anomalous situation that an automobile seized by state officers cannot be searched and forfeited without warrant as the Fourth Amendment is interpreted by the Florida Supreme Court, while that same automobile, seized for identical reasons by federal officers, can be searched and forfeited without warrant under

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[3]The majority view of the federal circuits, as set out in Valdes is that no antecedent warrant is required for seizure, search, and forfeiture of an automobile under a civil forfeiture act. United States v. Pace, 898 F.2d 1218 (7th Cir.), *cert. Denied*, 497 U.S. 1030, 110 S.Ct. 3286, 111 L.Ed.2d 795 (1990); United States v. One 1978 Mercedes Benz, 711 F.2d 1297 (5th Cir. 1983); United States v. Kemp, 690 F.2d 397 (4th Cir. 1982); United States v. Bush, 647 F.2d 357 (3d Cir. 1981). The minority view, as expressed in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992) is that a warrant is required before seizure, search and forfeiture. The Tenth Circuit has adopted Lasanta in United States v. Dixon, 1 F.3d 1080 (10th Cir. 1995), holding that either a warrant or a recognized exception thereto is required for a valid seizure. An intermediate approach is adopted by other circuits, limiting the validity of warrantless seizure under a forfeiture statute to situations where exigent circumstances exist, In re Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307 (1st Cir. 1988), or where there is a recognized exception to the warrant requirement, United States v. Linn, 880 F.2d 209 (9th Cir. 1989).

[4]In Lasanta, the Second Circuit expressly acknowledged its construction of federal civil forfeiture statute 21 U.S.C. § 881(b)(4) directly conflicted with that of Valdes. 978 F.2d 1304.

the Fourth Amendment, as interpreted by the Eleventh Circuit. Such a result cannot be permitted to stand.

As is apparent, the result of the Florida Supreme Court's decision is that there are now two different Fourth Amendment standards applying to seizures, searches, and forfeitures in Florida. The Florida Supreme Court's holding is contrary to this Court's decisions as well as contrary to the Eleventh Circuit's decision on this subject matter.

The decisions of this Court on seizure questions arising under the Fourth Amendment make clear that no antecedent warrant is required for law enforcement to validly seize a motor vehicle or other readily moveable instrumentality. That has been settled law from this court for three quarters of a century. Carroll v. U.S., 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

In Carroll, the court upheld warrantless stop of a vehicle, search of the interior, confiscation of contraband liquor found therein and potential forfeiture of the automobile under a federal prohibition forfeiture act[5]. The facts of Carroll show that on September 29th, 1921 federal agents attempted to set up a liquor buy of three cases of whiskey in a Grand Rapids, Michigan, apartment. The sellers, Kurska, Carroll and Kiro never brought the liquor. The officers noted they were driving an Oldsmobile. On October 6th, the officers saw Carroll and Kiro in the same car on the Grand Rapids-Detroit road, and followed them, but eventually lost them. On December 15, 1921, the officers spotted Carroll and Kiro in the same car heading into Grand Rapids from the direction of Detroit. The federal officers and a state trooper turned around and stopped the car about 16 miles east of Grand Rapids. A search of the car uncovered bottles of liquor hidden behind the seat upholstery. 267 U.S. at 134-136. "The officers were not anticipating that the defendants would be coming through on the highway at that particular time, but when they met them there

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[5]The Court has affirmed that forfeitures are in rem civil proceedings, not in personam criminal proceedings, and do not impose punishment. United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

they believed they were carrying liquor, and hence the search, seizure, and arrest." Id. at 136.

On these facts, the Court found probable cause to stop, conduct the search, no basis for suppression of the liquor, but eligibility of the vehicle for seizure under a Prohibition forfeiture act. This Court stated in Carroll, "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for the belief that the contents of the automobile offend against the law." 267 U.S. at 158-159. After extensive review of the long standing doctrine that no warrant is needed for stop and search of vessels, wagons, and other readily mobile instrumentalities, the court stated that by

> what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

267 U.S. 162

To pose the question addressed in Carroll to the instant matter: What reasonable cause did the seizing officer here have for the belief that the contents of Respondent's automobile offend against the law? This record demonstrates that the facts here are just as strong as, if not more so, than those found by the Court in Carroll to be clearly sufficient to establish basis for a lawful stop, search and seizure.

Respondent here was seen by police eyewitnesses, and was videotaped utilizing his automobile to deliver and sell cocaine. White v. State, 680 So.2d 550, 551 (Fla. 1st DCA 1996), (A 25). These events occurred on July 26, August 4 and August 7, 1993. (A 2, n.2). Appellant was arrested on unrelated charges on October 14, 1993, and his car seized by the officers on

belief that it had been used in the above noted drug transactions. (A 2).

In Carroll, the Court found reasonable cause to believe the car was being utilized to transport contraband liquor when it was seen on a public highway some two and a half months after one failed liquor transaction. Here, the car was seized some two and a half months after three successfully completed narcotics transactions.

Once a valid seizure has been established, supra, it naturally, logically, and legally flows as a result of that seizure that the vehicle can be searched, incriminating evidence uncovered as a result of that search introduced against petitioner at trial, and the vehicle can be forfeited. Indeed, this is precisely what the Court has held in cases pursuant to the long established doctrine set down in Carroll.

For example, in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), the Court permitted seizure and forfeiture under a Puerto Rican drug statute of a pleasure yacht without prior warrant or prior adversary hearing, even though the yacht owner, the leasing company, was completely unaware of illegal activity on the vessel. The seizure of the vessel took place two months after the offense, and the boat was forfeited to the Puerto Rican government.

The Court in Calero-Toledo noted that preseizure notice of forfeiture could well frustrate the interests served by the statute because a readily moveable instrumentality such as a yacht --or in this case, an automobile -- could be moved out of the jurisdiction, damaged, destroyed, or concealed if advance warning were given. The Court further noted that forfeiture statues serve an important governmental interest by removing from circulation the conveyance, which can be used to facilitate illegal activity time and time again, and, by forfeiture of the conveyance, rendering the illegal activity as a whole unprofitable.

In Cooper v. California, 386 U.S. 58, 87 S. Ct. 788, 17 L.Ed.2d 730 (1967), the Court upheld against Fourth Amendment challenge the seizure, subsequent search, and

introduction of narcotics into evidence. Appellant in Cooper was arrested for narcotics charges, and his car seized without warrant and impounded for evidence and subsequent forfeiture under California law[6]. As here, the basis of the seizure was evidence which showed the car had been used to carry on narcotics possession and transportation. The car was searched a week after seizure without warrant at the impound yard, and the Court held that evidence discovered during that search was validly introduced during trial. The car was forfeited to the state four months after the seizure. The Court stated, 386 U.S. 58, 62:

> It is no answer to say that the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to obtain a warrant, but whether the search was reasonable. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

(internal bracketing, quotations and citation deleted)

Of recent note, the Court in Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) held there was no constitutionally required "innocent owner" defense to forfeiture, and such did not offend the compensation component of the Fifth Amendment made applicable to the states through the due process clause of the Fourteenth Amendment. This holding is in direct conflict with the rationale of the Florida Supreme Court in the instant case that, "We simply cannot accept the government's position that it may act at anytime,

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[6]The statute, Section 11611 of the California Health and Safety Code specified that when making a narcotics arrest, the arresting officer was to seize "any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics[.]" 386 U.S. 58, 60. The car was to be held as evidence by the state until a forfeiture or release was ordered. Id. Section 11610 of the California code specified that the owner of any automobile used for such purposes forfeited his ownership interest in the vehicle to the state. Id. at n.1.

anywhere, and regardless of the existence of exigent circumstances, or a change in ownership or possession, to seize a citizen's property once believed to have been used in illegal activity, without securing authorization of a neutral magistrate." (A 8)[7].

Besides being contrary to controlling decisions of this Court, the Florida Supreme Court decision is in opposition to settled law of the Eleventh Circuit. In United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989) the Eleventh Circuit rejected the proposition adopted by the Florida Supreme Court here, namely that the Fourth Amendment requires a pre-seizure warrant to validly effect a seizure under a forfeiture statute. In so doing, the Eleventh Circuit found that 21 U.S.C. § 881(b)(4) plainly and unambiguously authorized the government to seize an offending vehicle where there was probable cause to believe it forfeitable. 876 F.2d at 1557. The Eleventh Circuit upheld the seizure and subsequent search even though there were no exigent circumstances. Id. The Court stated, 876 F.2d at 1558:

> Appellants contend that the seizures in this case were unreasonable, and thus violated the amendment, because they were made without a warrant, and no exigent circumstances which made the acquisition of a warrant impracticable existed. Hence, the district court should have invoked the exclusionary rule and suppressed the challenged evidence. *See, e.g., Torres v. Puerto Rico*, 442 U.S. 465, 471, 99 S.Ct. 2425, 2430, 61 L.Ed.2d 1 (1979).
>
> The agents seized Valdes' Cadillac on the street, in front of Lopez' house; they seized Lopez' Oldsmobile Toronado in his garage. Neither appellant contends that the agents

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[7]There simply was no change of ownership or possession of this automobile. Bennis. Police could validly seize the vehicle later, at a different location, without obtaining any intervening warrant, and subject the vehicle to forfeiture. Carroll.

> seized his automobile from a place where he had a legitimate expectation of privacy; in other words, we assume the agents had a right to be where they were when they took the cars.
>
> We are aware of no Supreme Court precedent that would require us to hold that, on these facts. the agents needed a warrant to seize appellants' automobiles.

In so holding, the Eleventh Circuit analogized to this court's decision in United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), upholding warrantless arrest of a person by postal inspectors on statutory authority. The Eleventh Circuit concluded by relying on this Court's decision in Calero-Toledo, supra for the proposition that, "If federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs[,]" and found the seizure reasonable under the Fourth Amendment. 876 F.2d at 1559-1560.

It is readily apparent from an examination of the federal forfeiture statute, 21 U.S.C. § 881, interpreted in Valdes to require no pre-seizure warrant under the Fourth Amendment and the operative state statute here, the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993), interpreted by the Florida Supreme Court to require a warrant under the Fourth Amendment, that the two enactments are analytically indistinguishable on the issue presented. Both provide for warrantless seizure of a vehicle on probable cause[8]

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[8]Section 932.703(2)(a), Florida Statutes (1993) provides: "Personal property may be seized at the time of the violation or subsequent to the violation..."The statute clearly intends for there to be viable pre-hearing seizures, for it provides for "a postseizure adversarial preliminary hearing" upon request. Section 932.703(2)(a), Florida Statutes (1993). At the adversarial preliminary hearing, "the seizing agency is required to establish probable cause that the property is subject to forfeiture[.]" Section

that the car was used "to transport, or * * * to facilitate the transportation, sale, receipt, possession, or concealment of" controlled substances, 21 U.S.C. § 881 (b)(4), or, as phrased by the state statute, "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." Section 932.702(3), Florida Statutes (1993).

Section 932.701(2)(a)1, Florida Statutes (1993) defines contraband as including any substance controlled under Chapter 893, Florida Statutes[9], and any substance, device, paraphernalia, currency, or other means of exchange used or attempted to be used in violation of the provisions of chapter 893.

The Florida Supreme Court decision is also contrary to the majority of state court decision which have addressed this issue under federal, as opposed to state constitutional grounds. In Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820, 232 Ga. 671, 208 S.E.2d 483 (Ga. 1974), the Georgia Supreme Court permitted warrantless seizure and subsequent forfeiture of liquor kept at a social club in a "dry" county. Relying on Calero-Toledo v. Pearson Yacht, the Georgia court found that opportunity for post-seizure hearing to contest the validity of the seizure was "sufficient process of law under the Federal Constitution[.]" 208 S.E.2d at 485. In State v. Brickhouse, 20 Kan. App. 2d 495, 890 P.2d 353 (Kan. App. 1995), the Kansas court upheld warrantless seizure, search and forfeiture of an automobile under a state forfeiture act because police officers had probable cause to believe the car was being used to violate state drug laws. Relying on Cooper and Valdes, and rejecting Lasanta, the Kansas court stated it found the majority view persuasive and held warrantless seizure and subsequent search of a motor vehicle under a state forfeiture act based on probable cause the car was being used

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932.701(2)(f), Florida Statutes (1993).

[9]Titled "Drug Abuse Prevention and Control" Chapter 893 prohibits, among other things, delivery or distribution of cocaine. Chapter 893.03(2)(a)4.

to violate state drug laws did not violate the Fourth Amendment. It further held that evidence uncovered during the search could be validly introduced into evidence at a criminal trial. In Frail v. $24,900 in United States Currency, 192 W.Va. 473, 453 S.E.2d 307 (W. Va. 1994), the West Virginia Supreme Court permitted warrantless seizure of property upon probable cause under that state's forfeiture act, finding §881(b)(4) persuasive on the issue, but reversing the judgment because it found there was insufficient probable cause in the case to justify the original seizure. In State v. Gwinner, 59 Wash. App. 119, 796 P.2d 728 (Wash. App. 1990), *review denied*, 117 Wash. 2d 1004, 814 P.2d 266 (1991), a state officer provided a tip to federal officers which ultimately led the DEA agents to seize and search a truck at an airport parking garage without warrant pursuant to § 881(b)(4). The cocaine uncovered in the truck was introduced against appellant at his state trial. The state court rejected Fourth Amendment challenge to the warrantless search and seizure, finding the federal officers had probable cause, all that is required under § 881(b)(4). The state court recognized that although the warrantless seizure and search was valid under the Fourth Amendment, it might well have been invalid if analyzed under state constitutional provisions. However, the court said that the reasonableness of a search by federal officers is to be judged under federal, not state search and seizure doctrine[10].

Seemingly, only two state courts have reached a result in alignment with that of the Florida Supreme Court in this case. In Davis v. State[11], 813 P.2d 1178 (Utah 1991), the Utah Supreme Court read its state forfeiture statute (similar to § 881(b)(4)) as requiring either a warrant or exigent circumstances for seizure under that state statute. The court stated it was reached this result because the Utah statute was "significantly different" than the federal law because it was not based on Admiralty principles. 813 P.2d 1178, 1182-1183.

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[10]This point is significant in that under the Florida Constitution, see n. 2, supra, there is no state standard. Search and seizure questions can only be resolved by reference to Fourth Amendment decisions of the Court.

[11]The other is Application of Harnischfeger, 158 Misc.2d 299, 600 NYS 2d 894 (Sup. 1993) in which the court observed in dicta that the constitutionality of warrantless seizure authorized by a state forfeiture statute was in doubt in light of the then recently issued Lasanta decision of the Second Circuit. 600 NYS 2d 894, 896-897. Harnischfeger was issued by a trial level New York court, and a Shepherd's check turns up no subsequent citations to it.

This Court has upheld seizure without warrant or prior notice and subsequent forfeiture of the conveyance under forfeiture statutes for over 75 years. Such is the case when the seizure of the offending conveyance occurs two and a half months later and up to 16 miles away from the site of the offense. Carroll. Such seizure is permissible with no prior notice. Calero-Toledo. Such forfeiture is permissible even if the owner of the conveyance be wholly innocent. Calero-Toledo, Bennis. Search of a conveyance held subject to forfeiture requires no warrant. Cooper.

Necessity for obtaining an antecedent warrant under the Fourth Amendment for seizure and forfeiture of a conveyance has been rejected by this Court in the context of both federal, Carroll, and state or territorial forfeiture statutes, Calero-Toledo, as well as for search post-seizure of such a conveyance, Cooper. Necessity of an antecedent warrant under the Fourth Amendment for seizure under an analytically indistinguishable federal civil forfeiture statute has been rejected by the Eleventh Circuit. Valdes.

It is thus seen that the Florida Supreme Court clearly erred in its interpretation of well settled law established by the decisions of this Court and of the Eleventh Circuit in holding that the Fourth Amendment requires issuance of a warrant for seizure, pursuant to the Florida Contraband Forfeiture Act, of a conveyance reasonably believed to have been utilized for the transportation and to facilitate the sale of cocaine.

CONCLUSION

The decision of the Florida Supreme Court below is in conflict with well established Fourth Amendment law as set down in decisions of this Court as well as a decision of the Eleventh Circuit. Because of this conflict, Respondent respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX TO WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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SUPREME COURT OF FLORIDA

TYVESSEL TYVORUS WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

No. 88,813

[February 26, 1998]

ANSTEAD, J.

We have for review the opinion in White v. State, 680 So. 2d 550 (Fla. 1st DCA 1996). We accepted jurisdiction to answer the following question certified to be of great public importance:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE

INADMISSIBLE IN A CRIMINAL PROSECUTION.

Id. at 555. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed below, we answer the certified question in the affirmative. We hold that a citizen's property is protected by the federal and Florida constitutions against warrantless seizure even when the seizure is done pursuant to a statutory scheme for forfeiture.

MATERIAL FACTS[1]

On October 14, 1993, petitioner Tyvessel Tyvorus White (White) was arrested at his place of employment on charges unrelated to this case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been used several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture by the government.[2] After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.

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[1]The following facts are taken from the First District's opinion. White, 680 So. 2d at 551-55.

[2]The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993. We commend the State's candor in providing these dates during oral argument. As both parties noted at oral argument, the record is unclear as to the actual dates. The State noted that these dates are contained in White's motion for postconviction relief under Florida Rule of Criminal Procedure 3.850.

Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine; and subsequently the trial court formally denied White's objection and motion to suppress the cocaine evidence.

On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993) (hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures.[3] In dissent, Judge Wolf asserted that the "warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as

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[3]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amend. IV, U.S. Const. In 1982, article I, section 12 of the Florida Constitution was amended to add what has become known as the conformity clause because "we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and provide no greater protection than those interpretations." Bernie v. State, 524 So. 2d 988, 990-91 (Fla. 1988); see Soca v. State, 673 So. 2d 24, 27 (Fla.), cert. denied, 117 S. Ct. 273 (1996).

a result of prior narcotics transactions." White, 680 So. 2d at 557 (Wolf, J., concurring in part and dissenting in part).

Because the court found that neither this Court nor the United States Supreme Court had addressed the issue of whether law enforcement agencies must obtain a warrant prior to seizing a citizen's property under the Florida Contraband Forfeiture Act, the First District certified the issue as one of great public importance to this Court.

LAW AND ANALYSIS

In holding that no prior court authorization was required in order to seize and search White's vehicle, the First District majority applied the "automobile exception" to the warrant requirement. While we recognize the continuing validity of the "automobile exception" to the warrant requirement, we find it inapposite here.

In his dissent, Judge Wolf relied primarily on the opinion of the United States Court of Appeals for the Second Circuit in U.S. v. Lasanta, 978 F.2d 1300 (2d Cir. 1992).[4]

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[4]Because Lasanta contains a comprehensive and reasoned treatment of this issue, we quote from the Second Circuit's opinion at length:

> A threshold question presented here is whether the government's seizure of the car, without a warrant, as a civil forfeiture, was authorized. The forfeiture statute, 21 U.S.C. §881, gives power to the attorney general to seize for forfeiture, inter alia, a vehicle that is used to facilitate a narcotics transaction. In carrying out such a statutorily authorized seizure, however, agents of the attorney general must also obey the constitution, particularly the fourth amendment's command that there be no unreasonable seizures.
>
> . . . .

> We find no language in the fourth amendment suggesting that the right of the people to be secure in their "persons, houses, papers, and effects" applies to all searches and seizures except civil-forfeiture seizures in drug cases. U.S. Const. amend. IV. We reject out of hand the government's argument that congress can conclusively determine the reasonableness of these warrantless seizures, and thereby eliminate the judiciary's role in that task of constitutional construction. See U.S. Const. art. VI, cl. 2. While congress may have intended civil forfeiture to be a "powerful weapon in the war on drugs", United States v. 141st Street Corp. by Hersh, 911 F.2d 870, 878 (2d Cir. 1990) (noting statute's legislative history), cert. denied, 498 U.S. 1109, 111 S. Ct. 1017, 112 L. Ed. 2d 1099 (1991), it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the constitution itself a casualty.
>
> . . . .
>
> To be valid, therefore, this warrantless seizure must meet one of the recognized exceptions to the fourth amendment's warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564 (1971). Surely the government cannot argue that the canister, tucked underneath the driver's seat, was found in the plain view of an investigative officer in a place she was entitled to be. See, e.g., Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (explaining the elements of a plain-view seizure). Nor does the government claim that the search was incident to Cardona's arrest, which occurred on the doorstep of Cardona's home. See, e.g., Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2039-40, 23 L. Ed. 2d 685 (1969) (police may search arrestee's person and area within his immediate control incident to arrest). The substantial distance between the site of Cardona's arrest and the vehicle in the driveway forecloses any question of the agents' need to search the vehicle for weapons to ensure their safety during the arrest. Chimel, 395 U.S. at 763, 89 S. Ct. at

He also noted this Court's opinion in Department of Law Enforcement v. Real Property, 588 So. 2d 957, 963 n.14 (Fla. 1991), wherein we recognized that because "article I, section 12 of the Florida Constitution expressly requires conformity with the fourth amendment of the United States Constitution,

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2040 (noting that safety animates this seizure rationale).

> The government does not even suggest that exigent circumstances might justify its warrantless seizure of the vehicle. See, e.g., Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (outlining the automobile exception to the warrant requirement); Carroll v. United States, 267 U.S. 132, 146, 45 S. Ct. 280, 282, 69 L. Ed. 543 (1925) (noting rationale of automobile exception). Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep.
>
> Nor was it impractical for the agents to obtain a warrant to seize Cardona's car. See, e.g., United States v. Paroutian, 299 F.2d 486, 488 (2d Cir. 1962) (search upheld when exceptional circumstances rendered it impractical to secure warrant). Previous surveillance had made agents aware of the vehicle's presence, thus enabling them to have requested and obtained a search warrant during either of their two attempts to secure a warrant to arrest Cardona. Even if the agents had been surprised by the presence of the limousine, and even if they harbored probable cause to suspect it contained evidence of narcotics-related activity, they still could have posted an agent to remain with the vehicle, and then secured a search warrant.

Id. at 1303-06. This reasoning is sound and speaks for itself.

the warrant requirement of article I, section 12 also applies to seizures in forfeiture actions under Florida law." White, 680 So. 2d at 558 (Wolf, J., concurring in part and dissenting in part).

DEPARTMENT OF LAW ENFORCEMENT

In Department of Law Enforcement, we were able to uphold the constitutionality of Florida's forfeiture act only by imposing numerous restrictions and safeguards on the use of the act in order to protect a citizen's property from arbitrary action by the government. In discussing the act we declared:

> The Act raises numerous constitutional concerns that touch upon many substantive and procedural rights protected by the Florida Constitution. In construing the Act, we note that forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity. Therefore, this Court has long followed a policy that it must strictly construe forfeiture statutes.

588 So. 2d at 961. The major thrust of our holding was that in order to comply with constitutional due process requirements, the government must strictly observe a citizen's constitutional protections when invoking the drastic remedy of forfeiture of a citizen's property. In addition to expressly holding that the Fourth Amendment applies to forfeiture attempts by the government, we specifically explained:

> In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the

> court shall authorize seizure of the personal property if it finds probable cause to maintain the forfeiture action.

Id. at 965. We conclude that the government's unauthorized and warrantless seizure, absent exigent circumstances not established here, clearly violated the constitutional safeguards we recognized in Department of Law Enforcement.

The government did not seek a warrant or an "ex parte preliminary hearing" here in order to secure a neutral magistrate's determination of probable cause. The government just seized the property, thereby putting the property owner and any others claiming an interest in the property in the position of having to take affirmative action against the government in order to protect their rights. This is the very antithesis of the cautious procedure we mandated in Department of Law Enforcement. We simply cannot accept the government's position that it may act at anytime, anywhere, and regardless of the existence of exigent circumstances, or a change in ownership or possession, to seize a citizen's property once believed to have been used in illegal activity, without securing the authorization of a neutral magistrate.

AUTOMOBILE EXCEPTION

As previously noted, the only basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement. The district court majority cited California v. Carney, 471 U.S. 386, 391 (1985), for the proposition that automobiles are afforded less Fourth Amendment protection against warrantless searches and seizures due to their "ready mobility" and diminished expectations of privacy due to their pervasive governmental regulation. The automobile exception is predicated upon the

existence of exigent circumstances consisting of the known presence of contraband in the automobile at the time, combined with the likelihood that an opportunity to seize the contraband will be lost if it is not immediately seized because of the mobility of the automobile. See Chambers v. Maroney, 399 U.S. 42 (1970). For example, in Carney, law enforcement officers had direct evidence[5] that illegal drugs were present and that the suspect was distributing illegal drugs from the vehicle. Accordingly, the Court concluded that the officers "had abundant probable cause to enter and search the vehicle for evidence of a crime." Carney, 471 U.S. at 395.

Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that Carney and the automobile exception are inapposite as authority. There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity. The exigent circumstances implicit in the former situation are simply not present in the latter situation.

The automobile exception is a narrow, situation-dependent exception which requires much more than the fact that an automobile is the object sought to be seized and searched. Critically, there must be probable cause to believe contraband

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[5]A young man who had just left the motor home only moments before told agents of the Drug Enforcement Administration that he had received marijuana from the suspect while in the motor home. Carney, 471 U.S. at 388.

is in the vehicle at the time of the search and seizure, Carney,[6] and there must be some legitimate concern that the automobile "might be removed and any evidence within it destroyed in the time a warrant could be obtained." Lasanta, 978 F.2d at 1305. The majority opinion below simply failed to address the fundamental requirement of Carney:

> In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause [to believe contraband is in the vehicle] is met.

471 U.S. at 392 (emphasis added).

As is vividly demonstrated in the Lasanta case, cited by Judge Wolf, the automobile exception does not apply to either the facts of that case or White's case. See White, 680 So. 2d at 557 (Wolf, J., concurring in part and dissenting in part) (noting that White was arrested at his workplace, his car keys were in his pocket, and his car was parked outside in his company's parking lot). In Lasanta, the court could easily have been writing about this case when it described the obvious absence of exigent circumstances in the government's forfeiture seizure:

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[6]See also Pennsylvania v. Labron, 116 S. Ct. 2485, 2487 (1996) (reaffirming Carney in reasoning that if a car "is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more"); California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained").

> The government does not even suggest that exigent circumstances might justify its warrantless seizure of the vehicle. See, e.g., Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (outlining the automobile exception to the warrant requirement); Carroll v. United States, 267 U.S. 132, 146, 45 S. Ct. 280, 282, 69 L. Ed. 543 (1925) (noting rationale of automobile exception). Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep.

978 F.2d at 1305. Similarly, the absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here. The exception does not apply when no probable cause exists and the police arrest either a sleeping suspect, Lasanta, or a suspect at work with the keys in his pocket. White. There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately.

SEIZURE OF PROPERTY VS. SEIZURE OF PERSON

Finally, the reasoning of the district court majority, that since a defendant's person can be seized without a warrant his property should be no different, simply proves too much. If we were to follow that reasoning to its logical conclusion we would, in essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property.[7] It will always be more intrusive to seize a person than it will be to seize his property. That is the nature of human values. However, such an approach would apparently have us do away with the constitutional law of search and seizure as to property entirely, simply because we have permitted the warrantless arrest of a person.

The United States Supreme Court has purposely subjected the Fourth Amendment to only a "few well-delineated exceptions." Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). For example, the courts have carefully restricted the law of search and seizure to permit a limited search of an arrestee and his person "incident" to a valid arrest. See Chimel v. California, 395 U.S. 752 (1969). However, the reasoning of the district court majority, if carried to its logical bounds, would do away with the limitations established to a search incident to a lawful arrest and now permit a search of anything, anywhere, based upon probable cause, without a warrant, since those actions involving property would obviously be less

[7]As Chief Justice Kogan recently reminded us, the genius of our federal and state constitutions is that they define basic rights that neither the legislative nor executive branches can modify. Krischer v. McIver, 697 So. 2d 97, 112 (Fla. 1997) (Kogan, C.J., dissenting). These remarkable documents fenced off from the "ordinary political process" these rights guaranteed all Americans by ensuring they "could not be repealed by a mere majority vote of legislators nor . . . alter[ed] through any process except constitutional amendment." Id. at 112-13.

intrusive than seizing the person. Obviously, we are not willing to accept such a proposition and its implications.[8]

CONCLUSION

In the end, the maintenance of an orderly society mandates that a citizen's property should not be taken by the government, in the absence of exigent circumstances, without the intervention of a neutral magistrate. Certainly the warrant requirement would have posed no undue burden on the government here where the vehicle was parked safely at the petitioner's place of employment and the government had the keys and the petitioner in custody. Moreover, any

[8]As Judge Wolf correctly observed in his dissent below, the Fourth Amendment mandates that absent exigent circumstances, police must secure a warrant for the search and seizure of an automobile. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Indeed, Coolidge's holding remains good law to the extent that "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" Id. at 468. Moreover, in the case that overruled Coolidge in part, Horton v. California, 496 U.S. 128 (1990), the Supreme Court not only reaffirmed Coolidge's essential holding but also noted that it had extended "the same rule to the arrest of a person in his home." Id. at 137 n.7. Therefore, since no exigent circumstances existed in this case, the warrantless seizure of White's car was unconstitutional. See Coolidge, 403 U.S. at 454-55 (reaffirming rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions") (emphasis added). Even though automobiles are afforded lesser Fourth Amendment protection, there is still a strong presumption against warrantless searches and seizures of a citizen's property by the government, absent exigent circumstances. See Coolidge, 403 U.S. at 468 (reiterating that "even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure"). Coolidge's requirement that a "plain view" seizure must also be "inadvertent" was overruled in Horton, 496 U.S. at 140. Minus that incidental reasoning, Coolidge remains good law.

inconvenience to the government pales in comparison to the consequences for our justice system and constitutional order if such abuses are left unchecked. See Department of Law Enforcement. As the Second Circuit poignantly observed in Lasanta, 978 F.2d at 1305, "it would, indeed, be a Pyrrhic victory for the country, if the government's imaginative use of that weapon [civil forfeiture] were to leave the constitution itself a casualty."

In summary, we answer the certified question in the affirmative and hold that the warrantless seizure of a citizen's property is protected by the federal and Florida constitutions even when the seizure is made pursuant to a statutory forfeiture scheme. Accordingly, we quash the First District's opinion and remand this case for proceedings consistent herewith.

It is so ordered.

KOGAN, C.J., SHAW and HARDING, JJ., and GRIMES, Senior Justice, concur.
WELLS, J., dissents with an opinion, in which OVERTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

WELLS, J., dissenting.

For more than twenty-three years, Florida's forfeiture statute has been enforced by Florida courts, including this Court, as the legislature wrote it. Today, by this decision, the majority judicially amends this twenty-three-year-old statute and places Florida in the minority of federal and state jurisdictions, which require a preseizure warrant in order to enforce forfeiture statutes. Today's decision also puts our state

procedure at odds with federal forfeitures in Florida since the Eleventh Circuit is among the majority of jurisdictions which recognize that warrantless seizures pursuant to forfeiture statutes are not in violation of the Fourth Amendment to the United States Constitution.

I dissent because I agree with the majority of jurisdictions and the Eleventh Circuit and do not believe that this change in the law of Florida is suddenly required by the Fourth Amendment. The case of United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), upon which the majority opinion relies, is clearly the minority view.

The seizure in this case was not an unusual enforcement of Florida's forfeiture law or contrary to forfeitures which the appellate courts of Florida have approved since the inception of the statute. Clearly, the period of time between when the police eyewitnesses and the video-tape evidence showed the vehicle being used in the delivery and sale of cocaine and the seizure of the vehicle was within previous approvals by Florida courts. Soon after the forfeiture statute became effective on October 1, 1974, it was recognized that proof of past violations may be the basis for forfeiture. State v. One 1977 Volkswagen, 455 So. 2d 434 (Fla. 1st DCA 1984) (police properly seized a vehicle based upon drug transaction occurring almost two months prior to seizure), approved, 478 So. 2d 347 (Fla. 1985); Knight v. State, 336 So. 2d 385, 387 (Fla. 1st DCA 1976), cert. denied, 345 So. 2d 427 (Fla. 1997).

In 1983, the Second District directly confronted the issue of whether a preseizure warrant needed to be obtained. The Second District held that it did not in State v. Pomerance, 434 So. 2d 329, 330 (Fla. 2d DCA 1983), stating:

> We have found no case addressing this issue. However, section 932.703, Florida Statutes (1981), which provides for the forfeiture of motor vehicles used to transport, conceal, or facilitate the sale of contraband, in violation of section 932.703, nowhere mentions obtaining a warrant; it simply states that an offending vehicle "shall be seized." We know of no rationale for judicially engrafting onto the statute a requirement that a warrant be obtained.

(Emphasis added.)

In 1985, in Duckham v. State, 478 So. 2d 347 (Fla. 1985), this Court did an analysis of the forfeiture statute and cases from our district courts and federal circuit courts and upheld the forfeiture of a motor vehicle seized almost two months after the vehicle had been used to facilitate a drug transaction. It is important to note that this seizure of the motor vehicle was not based upon there being probable cause to believe that there was contraband in the vehicle at the time of or before its seizure. The district court's decision in Duckham was approved with this Court noting:

> Even though no drugs had been transported in the car, no conversations had taken place in the car, the policeman had never been in the car, and Duckham used the car solely to transport himself to the restaurant where he struck the deal and then to his apartment, the district court found that Duckham used his car to facilitate the sale of contraband within the meaning of subsection 932.702(3), Florida Statutes (1981).

478 So. 2d at 348.

Also in 1985, this Court upheld the forfeiture statute against a due-process attack in Lamar v. Universal Supply Co., Inc., 479 So. 2d 109 (Fla. 1985). This Court specifically stated:

> The seizure of property pursuant to a forfeiture statute constitutes an extraordinary situation in which postponement of notice and hearing until after seizure does not deny due process. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974). The due process rights of claimants are adequately protected, therefore, by the requirement that the state attorney promptly file a forfeiture action following seizure. § 932.704(1), Fla. Stat. (1983).

479 So. 2d at 110.

In 1989, in an opinion written by Justice Overton, this Court did another extensive analysis of this statute in State v. Crenshaw, 548 So. 2d 223 (Fla 1989), and strongly upheld the enforcement of this statute.

The majority here cites to this Court's 1991 analysis of the forfeiture statute in Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). However, the majority's quote omits the following sentence which completes the paragraph from which the quote in the majority opinion is taken: "In those situations where a law enforcement agency already has lawfully taken possession of personal property during the course of routine police action, the state has effectively made an ex parte seizure for the purposes of initiating a forfeiture action." 588 So. 2d at 965. Through the date of that opinion (in fact until today) law enforcement agencies were considered to have lawfully taken possession of personal property when possession was taken on the basis of

and in conformity with the forfeiture statute. Lamar, 479 So. 2d at 110.

When Department of Law Enforcement is read in full context, that decision cannot be fairly said to engraft a warrant requirement into the statute. This was the reading given to that decision by the Second District in In re Forfeiture of 1986 Ford, 619 So. 2d 337, 338 (Fla. 2d DCA 1993), when it held that "nothing in [Department of Law Enforcement] or the forfeiture statute requires a warrant, consent or exigent circumstances."

Furthermore, the majority opinion here incorrectly states that "the only basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement." Majority op. at __. What the district court actually said was, "We are also influenced in our holding by the fact that the property seized here was a motor vehicle . . . ." White v. State, 680 so. 2d 550, 554 (Fla. 1st DCA 1996). The district court's opinion therefore correctly pointed out that privacy interests in a motor vehicle have a lesser degree of Fourth Amendment protection because of a vehicle's mobility and because the expectation of privacy is less than that relating to one's home or office, citing to California v. Carney, 471 U.S. 386 (1985). The statement by the district court majority is indisputably correct.

However, the clear reason for the district court majority's decision is the compelling development of precedent in Florida in respect to the statute, which the majority in this Court simply casts aside without mention, and the weight of authority from both federal and state jurisdictions, which the majority fails to acknowledge. One case representing the majority view is from the Eleventh Circuit: United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989). The district court majority followed the

reasoning of the Eleventh Circuit in Valdes. The rejection of Valdes by this Court's majority places Florida in the illogical (and I believe untenable) situation of there being a warrantless seizure available to federal law enforcement pursuant to the federal forfeiture statute because it is not a violation of the Fourth Amendment to the United States Constitution and a warrantless seizure not being available to Florida law enforcement pursuant to a substantially similar state forfeiture statute because of a holding by this Court that a warrantless seizure is in violation of the Fourth Amendment to the United States Constitution. Though we are not bound to do it, I believe this Court should apply the Fourth Amendment to the United States Constitution in accord with its application by the federal circuit court that has Florida within its jurisdiction. This is particularly so when the Eleventh Circuit's decision is in accord with the majority of other jurisdictions.

I believe the Seventh Circuit clearly expressed correctly the state of the law in federal and state jurisdictions in United States v. Pace, 898 F.2d 1218, 1241 (7th Cir. 1990), when it said:

> The weight of authority, however, holds that police may seize a car without a warrant pursuant to a forfeiture statute if they have probable cause to believe the car is subject to forfeiture. See, e.g., United States v. Valdes, 876 F.2d 1554, 1558-60 (11th Cir. 1989); United States v. $29,000--U.S. Currency, 745 F.2d 853, 856 (4th Cir. 1984); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983); United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 158 (3d Cir. 1981); United States v. One 1975 Pontiac LeMans, 621 F.2d 444, 450 (1st Cir. 1980) (citing cases). We agree with the majority

approach. The federal courts' overwhelming approval of warrantless forfeiture seizures based on probable cause, along with the historical acceptance of the constitutionality of such searches, are evidence that such searches have been generally accepted as reasonable. See United States v. Bush, 647 F.2d 357, 370 (3d Cir. 1981) (citing cases). It is difficult to ignore this general acceptance. Furthermore, under a civil forfeiture statute, "the vehicle . . . is treated as being itself guilty of wrongdoing." United States v. One Mercedes Benz 280S, 618 F.2d 453, 454 (7th Cir. 1980). Thus, seizing a car from a pubic place based on probable cause is analogous to arresting a person outside the home based on probable cause. Such an arrest, even without a warrant, does not violate the Fourth Amendment, although it is possibly a more significant intrusion on privacy interests than seizing an unoccupied car. See Bush, 647 F.2d at 370 (citing United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)); see also Valdes, 876 F.2d at 1559; One 1978 Mercedes Benz, 711 F.2d at 1302. And the Supreme Court has approved warrantless seizures in a similar situation. In G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), Internal Revenue Service agents seized cars subject to tax liens without a warrant. The Court held that the seizures did not violate the Fourth Amendment; the agents had probable cause to believe that the cars were subject to seizure, and the seizures took place "on public streets, parking lots, or other open places." See id. at 351-52, 97 S. Ct. at 627-28; G.M. Leasing provides strong support for the majority position. See One 1975 Pontiac

> LeMans, 621 F.2d at 450, which adopted the panel's reasoning in United States v. Pappas, 600 F.2d 300, 304 (1st Cir.), vacated 613 F.2d 324 (1st Cir. 1979); Bush, 647 F.2d at 369; see also 3 Wayne R. LaFave, Search and Seizure § 7.3(b), at 83 (2d ed. 1987). For all these reasons, we conclude that it was proper for the police to seize Pace's and Besase's cars from the parking lot of Savides' condominium complex, if the police had probable cause to believe the cars were subject to forfeiture.

(Emphasis added; footnote omitted.) See also United States v. Musa, 45 F.3d 922, 924 (5th Cir. 1995). I would continue Florida's adherence to this view.

Assuming that the warrantless seizure was authorized, there is no doubt that the inventory search was appropriate. See Caplan v. State, 531 So. 2d 88 (Fla. 1988); Padron v. State, 449 So. 2d 811 (Fla. 1984).

OVERTON, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 94-2823

(Bay County)

Nancy A. Daniels, Public Defender and David P. Gauldin, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Petitioner

Robert A. Butterworth, Attorney General; James W. Rogers, Bureau Chief, Criminal Appeals and Daniel A. David, Assistant Attorney General, Tallahassee, Florida,

for Respondent

SUPREME COURT OF FLORIDA

MONDAY, JUNE 1, 1998

TYVESSEL TYVORUS WHITE,	*
	*
Petitioner,	*
	* CASE NO. 88,813
v.	* District Court of Appeal
	* 1st District-No.94-2823
STATE OF FLORIDA,	*
	*
Respondent.	*
	*

****

Respondent's Motion for Rehearing is hereby denied.

KOGAN, C.J., SHAW, HARDING and ANSTEAD, JJ., and GRIMES, Senior Justice, concur.
OVERTON and WELLS, JJ., dissents.

A True Copy TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. Harold Bazzel, Clerk
Hon. Clinton E. Foster, Judge
Mr. David P. Gauldin
Mr. James W. Rogers
Mr. Daniel A. David

TEST

Sid J. White
Clerk, Supreme Court

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

Tyvessel Tyvorus WHITE, Appellant,
v.
STATE of Florida, Appellee.

No. 94-2823.

July 29, 1996.

Defendant was convicted in the Circuit Court, Bay County, Clinton Foster, J., of possession of cocaine, which was found during inventory search of his automobile following its warrantless seizure pursuant to Florida Contraband Forfeiture Act. Defendant appealed. On motion for certification, the District Court of Appeal, Van Nortwick, J., held that: (1) Act authorized warrantless seizure of vehicle based on probable cause to believe that defendant had previously used vehicle to facilitate sale of cocaine; (2) Act did not violate Fourth Amendment; and (3) defendant's pre-*Miranda* statement was involuntary.

Affirmed.

Wolf, J., issued concurring and dissenting opinion.

Nancy A. Daniels, Public Defender; David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

VAN NORTWICK, Judge.

We grant appellant's motion for certification, withdraw our prior opinion in this cause, substitute the following opinion in its stead, and certify a question of great public importance to the Florida Supreme Court.

Tyvessel Tyvorus White appeals his judgment and sentence for possession of cocaine. White argues that the trial court erred in denying his motion to suppress the introduction into evidence of cocaine found in White's car during a warrantless inventory search of the car following its seizure pursuant to the Florida Contraband Forfeiture Act, sections 932.701–932.707, Florida Statutes (1993), and in failing to exclude the testimony of a police officer relating to a prejudicial statement made by White prior to receiving "*Miranda* warnings." (FN1) Because we conclude (i) that the police had probable cause to seize White's vehicle under the Forfeiture Act and the subsequent inventory search of the seized car was a reasonable procedural measure and (ii) that White's statement was freely and voluntarily given without interrogation or its functional equivalent, we affirm.

Factual and Procedural Background

In October 1993, White was arrested at his place of employment by police officers with the Bay County Joint Narcotics Task Force and charged with the sale of a controlled substance. (FN2) Prior to his arrest, the arresting police officers had determined to seize White's automobile under the Forfeiture Act on the grounds that, based on police eye-witnesses and videotape, it had been used in the delivery and

sale of cocaine. As contemplated by the Forfeiture Act, section 932.703, Florida Statutes (1993), no prior court order or warrant was issued authorizing the seizure. The car was seized and removed to the task force headquarters, where a routine inventory search revealed two pieces of crack cocaine in the ashtray. Based on the seizure of this crack cocaine, White was also charged with possession of a controlled substance, his conviction for which is the subject of the instant appeal.

White was also transported to the task force headquarters. Prior to the arresting officer reading White his constitutional warnings, and during the course of the officer explaining to White the charges for which he was arrested, White remarked that "He had recently got back into the business." Because of prior discussions between the arresting officer and White, the officer understood the "business" to mean the sale of cocaine.

White moved to suppress the cocaine seized during the search of his car and, at trial, objected to the introduction of his statements made prior to receiving the *Miranda* warnings. The trial court reserved ruling on these issues and allowed the evidence and statements to go to the jury. White was found guilty as charged. At a subsequent hearing, White's suppression motion was denied.

Forfeiture Seizure and Subsequent Search

On appeal, White argues that the trial court should have suppressed the cocaine seized from his car. He contends that the seizure of his vehicle was impermissible since it was made without warrant or probable cause and the subsequent search was unreasonable under the Fourth Amendment since the forfeiture seizure was improper and the police had no probable cause to search the vehicle.

The Florida Contraband Forfeiture Act authorizes law enforcement agencies to seize vehicles "of any kind" used "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." s 932.701(2)(a)5; 932.702(3), Fla. Stat. (1993). The Forfeiture Act defines "contraband article" to include "any controlled substance as defined in chapter 893." s 932.701(2)(a)1, Fla. Stat. (1993). Chapter 893 includes cocaine and its derivatives in its list of controlled substances. s 893.03(2)(a)4, Fla. Stat. (1993). Thus, the Forfeiture Act clearly authorizes the police to seize vehicles used to facilitate the sale of cocaine.

The Forfeiture Act sets forth the procedure to be used in seizing personal property, as follows:

> Personal property may be seized at the time of the violation or subsequent to the violation, provided that the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to a(sic) adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act.

s 932.703(2)(a), Fla. Stat. (1993). A post-seizure adversarial preliminary hearing may be requested within 15 days after receipt of this notice and the hearing must be set and noticed by the seizing agency and held by the court within 10 days of receipt of the hearing request or as soon as practicable thereafter. *Id.* At the hearing, the court must determine whether probable cause existed for the seizure. s 932.703(2)(a), Fla. Stat. (1993). Thus, the only pre-seizure procedural requirement under the Forfeiture Act is the giving of a notice

of the right to a subsequent hearing. Here, White does not claim this notice requirement was violated.

White's argument that to seize his car under the Forfeiture Act the police were required to have probable cause to believe the vehicle contained contraband at the time of seizure is without merit. Under the Forfeiture Act, the seizing agency is required only to have probable cause to believe that the property sought to be seized "was used, is being used, was attempted to be used, or was intended to be used" in violation of the Forfeiture Act. s 932.703(2)(c), Fla. Stat. (1993). The fact that the police, as here, did not have probable cause to believe the vehicle contained contraband or was being used in violation of the Forfeiture Act at the moment they seized the vehicle does not render the seizure unlawful under the Act. Having probable cause to believe there was prior usage of the vehicle in violation of the Forfeiture Act is sufficient. (FN3) *See, Knight v. State,* 336 So.2d 385, 387 (Fla. 1st DCA 1976), *cert. denied,* 345 So.2d 424 (Fla.1977)(Forfeiture Act "clearly contemplates that proof of past violations of the act may provide the basis for forfeiture."); *State v. One (1) 1977 Volkswagen,* 455 So.2d 434 (Fla. 1st DCA 1984), *approved,* 478 So.2d 347 (Fla.1985)(police properly seized a vehicle based upon a drug transaction occurring almost two months prior to the seizure); *In re Forfeiture of 1979 Toyota Corolla,* 424 So.2d 922, 924 (Fla. 4th DCA 1982)("[T]ransportation by automobile of a key figure to the site of a drug transaction constitutes a sufficient nexus to justify the forfeiture of the car.").

Similarly, White's argument that the police were required to obtain a warrant or court order before seizing the vehicle is without merit. Nothing in the Forfeiture Act requires the obtaining of a warrant or court order before seizing a vehicle. *See, State v. Pomerance,* 434 So.2d 329, 330 (Fla. 2d DCA

1983)(The Forfeiture Act "nowhere mentions obtaining a warrant; it simply states that an offending vehicle 'shall be seized.' We know of no rationale for judicially engrafting onto the statute a requirement that a warrant be obtained."); *In re Forfeiture of 1986 Ford PU,* 619 So.2d 337, 338 (Fla. 2d DCA 1993)(Forfeiture Act does not require a warrant, consent, or exigent circumstances prior to seizing a vehicle used in violation of the statute).

The fact that the Florida Legislature has authorized by statute the warrantless seizure of a vehicle based upon probable cause that it had been used to facilitate a drug transaction, however, does not end our inquiry. The further question raised here is whether such a warrantless seizure of a motor vehicle violates constitutional prohibitions against illegal search and seizure. (FN4) We hold that it does not.

Neither the Florida nor United States Supreme Court has directly addressed whether the Fourth Amendment requires law enforcement officers to obtain a warrant prior to seizing a vehicle under the Florida Forfeiture Act or similar statute. The Florida Forfeiture Act, however, is substantively similar to the federal forfeiture statute, *see,* 21 U.S.C. s 881, and the Uniform Controlled Substances Act, *see,* 9 U.L.A. s 505. Thus, decisions of federal courts and courts of certain sister states are useful to our consideration here.

The federal circuits are split in their analysis of this issue. The majority of the circuits that have considered this question have held that a warrantless seizure of a vehicle under the federal forfeiture act does not violate the Fourth Amendment and that evidence obtained in a subsequent inventory search is admissible in a criminal prosecution. *U.S. v. Decker,* 19 F.3d 287 (6th Cir.1994); *U.S. v. Pace,* 898 F.2d 1218 (7th Cir.1990); *U.S. v. Valdes,* 876 F.2d 1554 (11th Cir.1989);

U.S. v. One 1978 Mercedes Benz, Four-Door Sedan, 711 F.2d 1297 (5th Cir.1983); *U.S. v. Kemp,* 690 F.2d 397 (4th Cir.1982); *U.S. v. Bush,* 647 F.2d 357 (3d Cir.1981). Only three circuits have held the procedure in question to have been a violation of a defendant's Fourth Amendment rights. *See, U.S. v. Dixon,* 1 F.3d 1080 (10th Cir.1993); *U.S. v. Lasanta,* 978 F.2d 1300 (2d Cir.1992); *U.S. v. $149,442.43 in U.S. Currency,* 965 F.2d 868 (10th Cir.1992); *U.S. v. Linn,* 880 F.2d 209 (9th Cir.1989). (FN5) We have examined these federal decisions and find the rationale employed by the majority view to be persuasive.

Several state appellate courts have also addressed this issue. For example, in *State v. McFadden,* 63 Wash.App. 441, 820 P.2d 53, 57 (Wash.App.1991), *rev. denied,* 119 Wash.2d 1002, 832 P.2d 487 (Wash.1992), the Washington court held:

> We hold that a motor vehicle seized pursuant to [Washington forfeiture statute] on probable cause that it is used to facilitate a drug transaction is subject to a valid inventory search and evidence found in the course of such a search is admissible at trial.

See also, Lowery v. Nelson, 43 Wash.App. 747, 719 P.2d 594 (Wash.App.1986), *rev. denied,* 106 Wash.2d 1013 (1986); *State v. Brickhouse,* 20 Kan.App.2d 495, 890 P.2d 353 (1995); *c.f., Davis v. State,* 813 P.2d 1178 (Utah 1991).

We join the majority of the federal and state jurisdictions which have considered this issue and hold that a warrantless seizure of a motor vehicle based on probable cause that the vehicle was used in violation of the Forfeiture Act does not violate the Fourth Amendment prohibition against unreasonable searches and seizure. Although the decisions upholding a warrantless forfeiture seizure state various reasons, we prefer

the rationale adopted by the Eleventh Circuit in *U.S. v. Valdes,* 876 F.2d at 1559-60. In *Valdes,* in upholding under the Fourth Amendment a seizure and subsequent inventory search of an automobile under the federal forfeiture statute, the court reasoned and held:

> If federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs. Appellants would have us accord the trafficker's property interest greater deference than his liberty interest; they seem to suggest that the injury caused by erroneous detention (i.e. the period of time between seizure, or arrest, and the magistrate's ruling ending the detention) is somehow greater in the case of one's property than it is in the case of one's liberty. We are not persuaded. We therefore hold that the warrantless seizures of appellants' automobiles, and the subsequent inventory searches, were not unreasonable under the fourth amendment. (Footnotes omitted).
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> *Id.*

We are also influenced in our holding by the fact that the property seized here was a motor vehicle, a type of property found by the Supreme Court to have less Fourth Amendment protection against warrantless searches and seizures under the so-called "automobile exception," *California v. Carney,* 471 U.S. 386, 390, 105 S.Ct. 2066, 2068, 85 L.Ed.2d 406 (1985). Although privacy interests in a motor vehicle are protected under the Fourth Amendment, under the automobile exception those interests have a lesser degree of protection because "the vehicle can be quickly moved out of the locality or jurisdiction

in which the warrant must be sought," *id.*, 471 U.S. at 390, 105 S.Ct. at 2069, and "because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id.*, 471 U.S. at 391, 105 S.Ct. at 2069. Thus, a warrantless search and seizure of a motor vehicle may pass constitutional scrutiny absent any exigent circumstances other than the characteristics inherent in a motor vehicle. *Id.* 471 U.S. at 390-91, 105 S. Ct. at 2069. Logically, for the same reasons, a motor vehicle may be seized under a forfeiture statute without a prior warrant. *See e.g., U.S. v. Linn,* 880 F.2d at 215; *U.S. v. $29,000--U.S. Currency,* 745 F.2d 853 (4th Cir.1984).

Because we hold that the police properly seized the appellant's vehicle under the Forfeiture Act, we conclude that the subsequent inventory search was reasonable and, thus, the cocaine seized in the vehicle was properly admitted at trial. *Cooper v. State of California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)(inventory searches pursuant to standard police procedures are reasonable under Fourth Amendment); *U.S. v. Valdes,* 876 F.2d at 1559-60; *State v. Pomerance,* 434 So.2d 329, 330 (Fla. 2d DCA 1983)(if the defendant's automobile was properly seized under the Forfeiture Act "the search of the trunk of the car was a proper inventory search"). We find *Cooper* directly applicable here. In *Cooper,* the Supreme Court upheld the warrantless search of a vehicle justified solely on the basis that the vehicle was in the lawful custody of the state following its seizure under California's forfeiture statute, ruling:

> It would be unreasonable to hold that the police, having to retain the car in their custody ... had no right, even for their own protection, to search it. It is no answer to say that the police could have obtained a search warrant, for

> "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz,* 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

Cooper, 386 U.S. at 61-62, 87 S.Ct. at 791.

Nevertheless, because we recognize that neither the Florida Supreme Court nor United States Supreme Court has directly addressed the issue presented here, and that the federal circuit courts have reached different conclusions concerning this constitutional issue, we certify to the Florida Supreme Court the following question as one of great public importance:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.

Statement Prior to Miranda Warning

White argues that his statement to the police that "[h]e had recently got back into the business" was made while he was in custody during the "functional equivalent" of interrogation and, therefore, violated the requirements of *Miranda.* We find, however, that competent substantial evidence in the record

supports a conclusion that the statement was spontaneously, freely, and voluntarily made and, accordingly, the trial court did not abuse its discretion in admitting the statement into evidence. *Gray v. State,* 640 So.2d 186, 194 (Fla. 1st DCA 1994).

Miranda established that "[p]rior to any questioning, the [suspect] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444, 86 S.Ct. at 1612. *Miranda* states, however, that "[a]ny statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." 384 U.S. at 478, 86 S.Ct. at 1630. Nevertheless,

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean
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> > questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

384 U.S. at 444, 86 S.Ct. at 1612. Thus, "[t]he fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated...." 384 U.S. at 478, 86 S.Ct. at 1630.

In *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Court concluded "that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.*, 446 U.S. at 300-301, 100 S.Ct. at 1689. The *Innis* court further concluded that the functional equivalent of interrogation under *Miranda* refers to practices that the police "should know" are "reasonably likely to elicit an incriminating response from the suspect." *Id.*, 446 U.S. at 301, 100 S.Ct. at 1689-1690. This interrogation standard is an objective one which "focuses primarily upon perceptions of the suspect, rather than the intent of the police." *Id.*, 446 U.S. at 301, 100 S.Ct. at 1690.

In the instant case, while the arresting officer was reading the arrest affidavits to White, explaining the charges for which he was arrested, White made the incriminating statement. Although at the time the statement was made, White had not been read his *Miranda* rights, his statement did not come in response to any question posed by the police. Thus, to conclude whether White's statement was properly admissible, it must be determined whether the statement was made voluntarily or through the functional equivalent of interrogation.

The Supreme Court in *Innis* "address[ed] for the first time the meaning of 'interrogation' under *Miranda* ...," *id.* 446 U.S. at 297, 100 S.Ct. at 1687-88, and discussed the two-prong analysis used in determining whether a suspect's statements are freely and voluntarily given or are the result of interrogation or its functional equivalent. In *Innis,* the defendant was arrested for murder, kidnapping and armed robbery, during which he had used a shotgun. *Innis,* 446 U.S. at 294, 100 S.Ct. at 1686. At the time of his arrest he was unarmed. *Id.* After being given his *Miranda* rights and stating that he wanted to speak with a

lawyer he was placed in the back of a police car. *Id.* During the ride to the police station the two arresting officers in the patrol car began a conversation about the missing shotgun, mentioning their concerns that one of the handicapped children from a nearby school might find the gun and injure themselves. *Id.*, 446 U.S. at 294-95, 100 S.Ct. at 1686-87. The defendant interrupted the conversation and stated that he would show the police were the gun was located. *Id.*, 446 U.S. at 295, 100 S.Ct. at 1687. The Supreme Court concluded that at the time the statement was made the defendant was not being interrogated within the meaning of *Miranda*. *Id.*, 446 U.S. at 302, 100 S.Ct. at 1690. The Supreme Court reasoned as follows:

> It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between [the] Patrolmen ... included no express questioning of the respondent....
>
> Moreover, it cannot be fairly concluded that the respondent was subject to the "functional equivalent" of questioning. It cannot be said, in short, that [the] Patrolmen ... should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent.

Id. The Court went on to explain that, while the officer's comments obviously "struck a responsive chord" in the defendant, the conversation did not amount to the functional equivalent of interrogation. *Id.*, 446 U.S. at 303, 100 S.Ct. at 1691. The Court reasoned that there was

> nothing in the record to suggest that the officers were aware that the respondent was *peculiarly susceptible* to an appeal to his conscience concerning the safety of handicapped children. Nor [was] there anything in the

> record to suggest that the police knew that the respondent was *unusually disoriented or upset* at the time of his arrest.

Id., 446 U.S. at 302-303, 100 S.Ct. at 1690. (Emphasis added). Therefore, the Court found that the record failed to show that the police "should have known" the conversation they had "was reasonably likely to elicit an incriminating response" from the defendant, *id.*, 446 U.S. at 303, 100 S.Ct. at 1691, and held the statement was properly admitted into evidence.

Similarly, in the instant case, it is undisputed that White's statement was not made in response to express questioning. Further, it cannot be fairly concluded that White was subject to the "functional equivalent" of questioning. The arresting officer's act of explaining the charges to White was reasonable and understandable given that White had just been placed under arrest and had asked to know why. Like in *Innis*, the fact that the officer's explanation may have "struck a responsive chord," causing White to interject that "[h]e recently got back into the business," does not constitute the functional equivalent of an interrogation. Nothing in the record indicates to us that the arresting officers should have known that the explanation of charges to White was reasonably likely to elicit an incriminating response. Further, nothing in the record shows that the officers were aware that White was "peculiarly susceptible" or so "unusually disoriented or upset" that simply informing him of the charges would likely evoke incriminating statements. Because we find that White's statement was made freely and voluntarily, and not in response to express questioning or during the functional equivalent of an interrogation, we hold that the statement was properly admissible at trial under *Miranda*. *See also, Hawkins v. State*, 217 So.2d 582, 583 (Fla. 4th DCA 1969).

AFFIRMED.

WEBSTER, J., concurs.

WOLF, J., concurs and dissents with written opinion.

WOLF, Judge, concurring in part and dissenting in part.

I concur in the majority's decision to certify a question to the Florida Supreme Court, but respectfully dissent from their decision to uphold the warrantless seizure of the automobile.

The warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as a result of prior narcotics transactions.

Appellant was arrested at his workplace based upon narcotics transactions unrelated to his present conviction. Officer Pierce was the arresting officer, and he was accompanied by Officer Squire. The purpose of Squire's presence at the arrest was to drive appellant's vehicle which was to be seized for forfeiture because it had been used to sell and deliver cocaine. There was no warrant authorizing seizure of the vehicle.

At the time of appellant's arrest, he had the car keys in his pocket and the vehicle was parked outside in the parking lot of his place of employment. The police seized and searched the vehicle. The subsequent search of the vehicle revealed two pieces of crack cocaine in the ashtray of the car. It is this cocaine which is the subject of the charges in the instant case.

The Fourth Amendment requires that police obtain a warrant for search and seizure of an automobile absent exigent circumstances. *Coolidge v. New Hampshire,* 403 U.S. 443, 91

S.Ct. 2022, 29 L.Ed.2d 564 (1971). While exigent circumstances may justify a warrantless seizure, no such circumstances exist in this case. The state argues, however, that the warrantless seizure is justified based on the fact that probable cause existed to believe that the car was subject to forfeiture. There is no Florida case that directly deals with this issue. In *Department of Law Enforcement v. Real Property,* 588 So.2d 957 (Fla.1991), the court found that notification was not constitutionally mandated prior to a seizure pursuant to the Florida Contraband Forfeiture Act, sections 932.701-932.704, Florida Statutes (1993). The court did not rule directly on whether a warrant was required, but stated,

> The state conceded at oral argument that the fourth amendment applies to the seizure
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> > of property in forfeiture actions, and argued that the fourth amendment protections adequately protect property owners. We fully agree that the fourth amendment applies when there has been a seizure.

Department of Law Enforcement, supra at 963. The court further states in a footnote,

> Since article I, section 12 of the Florida Constitution expressly requires conformity with the fourth amendment of the United States Constitution, *the warrant requirement of article I, section 12 also applies to forfeiture actions under Florida law.*
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> *Id.* at 963 (emphasis added).

The decision of the second district in *In re: Forfeiture of 1986 Ford PU,* 619 So.2d 337 (Fla. 2d DCA 1993), is not inconsistent with the supreme court's statement concerning the

applicability of the Fourth Amendment's warrant requirement. The court ruled that nothing in the case of *Department of Law Enforcement, supra,* or the forfeiture statute specifically requires a warrant, but the court did not specifically rule on whether a warrantless seizure would violate the Fourth Amendment. To the extent that the decision could be argued to support the argument that no warrant is required, it is unpersuasive because no analysis is presented to support this position.

Federal courts which have dealt with the necessity of obtaining a warrant when property is subject to a federal forfeiture statute have reached different conclusions. The ninth circuit has held that a warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment, (FN6) notwithstanding probable cause to believe that the car is subject to forfeiture. *UNITED STATES V. MCCORMICK,* 502 F.2D 281 (9TH CIR. 1974); *UNITED STATES V. SPETZ,* 721 F.2D 1457 (9TH CIR.1983). IN *U.S. V. LASANTA,* 978 F.2D 1300 (2ND CIR.1992)(FN7), the court discussed the cases which had upheld the warrantless seizures of automobiles subject to forfeiture and stated,

> We find no language in the fourth amendment suggesting that the right of the people to be secure in their "persons, houses, papers, and effects" applies to all searches and seizures except civil-forfeiture seizures in drug cases.

Id. at 1305. In rejecting the attorney general's argument, the court goes on to state,

> While congress may have intended civil forfeiture to be a "powerful weapon in the war on drugs," it would, indeed, be a Pyrrhic victory for the country, if the government's

> relentless and imaginative use of that weapon were to leave the constitution itself a casualty.

Id. at 1305 (citations omitted).

In *United States v. Valdes,* 876 F.2d 1554 (11th Cir.1989), the 11th circuit, however, justified a warrantless seizure of property subject to forfeiture on the basis that a warrantless arrest of a person may be made based on probable cause, and a person's property is entitled to no greater protection than the person himself. *See also U.S. v. Pace,* 898 F.2d 1218 (7th Cir.1990). Such warrantless seizures have also been upheld based on the lack of reasonable expectation of privacy attached to a car on a public street. *See Pace, supra* at 1242; *U.S. v. Bush,* 647 F.2d 357 (3rd Cir.1981). This line of reasoning is based on a statement in the Supreme Court's opinion in *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), where a warrantless seizure of an automobile by internal revenue agents to satisfy a tax levy was upheld. (FN8) Other cases seem to adopt the reasoning that once you have probable cause to seize a vehicle, or believe it is used for drugs, then exigent circumstances continue to exist even if the seizure is not made until several months later. *U.S. v. One Mercedes Benz, Four-Door Sedan,* 711 F.2d 1297 (5th Cir.1983); *U.S. v. Kemp,* 690 F.2d 397 (4th Cir.1982).

These cases validating a warrantless search absent exigent circumstances are unpersuasive. The argument concerning no reasonable expectation of privacy concerning your vehicle on a public street fails to recognize the factual situation in *G.M. Leasing Corp., supra.* That case involved a seizure of an automobile in order to satisfy a tax debt to the United States, a situation which is similar to a private repossession of an automobile to satisfy a debt. The language in this opinion concerning expectation of privacy on a public street must be

read in context of the facts of the case. A person who is in default on a debt or who is subject to a judgment lien does not have a reasonable expectation that his property will not be repossessed on a public street. On the other hand, a person has a reasonable expectation that if the government is seizing his property other than for purposes of satisfying a debt, a warrant will be secured. It is difficult to respond to the argument concerning the theory that if you once believed that the car contained drugs, you may forever seize the car based on exigent circumstances. This theory fails to recognize that both probable cause and exigent circumstances become stale and will no longer support the legality of a later seizure. *Cf. Montgomery v. State,* 584 So.2d 65 (Fla. 1st DCA 1991).

The argument relied on by the majority for upholding the search, that property may be seized based on probable cause much like a person, while having some initial facial appeal, is still equally unpersuasive. Neither the Supreme Court of the United States nor the Florida Supreme Court has accepted this position. General application of this concept would serve to totally emasculate the warrant requirements for the seizure of an automobile announced in *Coolidge, supra.* In addition, the position taken by the majority does not deviate from the argument that somehow the forfeiture statute authorizes warrantless seizures of property absent exigent circumstances, the very argument which is rejected in *In re: Warrant to Seize One 1988 Chevrolet Monte Carlo,* 861 F.2d 307, 311 (1st Cir.1988), and *O'Reilly v. United States,* 486 F.2d 208, 214 (8th Cir.1973).

I, therefore, see no reason to depart from the rule announced by the Supreme Court in *Coolidge, supra,* and alluded to by our supreme court in *Department of Law Enforcement,* that an automobile is not subject to warrantless seizure absent exigent circumstances.

FN1. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FN2. The charges on which White was arrested are not the subject of the instant appeal.

FN3. Here, the police had probable cause to believe White's vehicle had been used to facilitate the sale of cocaine, as indicated by the following trial testimony:

> THE COURT: Do you know what basis existed at the time you made the arrest and searched the car to file a forfeiture proceeding, what information did you have that that vehicle had been used in illegal activity?
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> OFFICER SQUIRE: These were all Doug Pierce's cases, it's my understanding this vehicle had been used to deliver and sell cocaine on at least two occasions, maybe three.
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> PROSECUTOR: And you had been present at at least one of those sales?
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> OFFICER SQUIRE: Yes.
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> THE COURT: A sale from the car?
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> OFFICER SQUIRE: Yes.

FN4. White has not challenged the forfeiture on due process grounds and we do not address due process issues here. *See, Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 676-80, 94 S.Ct. 2080, 2088-90, 40 L.Ed.2d 452 (1974)(due process does not require federal law enforcement officers to obtain a warrant prior to seizing property they have probable cause to believe is subject to forfeiture); *U.S. v. Valdes,* 876

F.2d 1554, 1560 at fn. 12 (11th Cir.1989)(due process is satisfied under forfeiture statute "if the government is required to have a sound basis for believing that property is forfeit, and the owner has a fair opportunity to regain it."); *Smith v. Hindery,* 454 So.2d 663 (Fla. 1st DCA 1984)(Forfeiture Act does not violate due process).

FN5. In each of *Dixon, Lasanta* and *Linn,* the court, while holding that the warrant requirement applied to seizures for the purpose of forfeiture, still found another method of admitting the evidence. In *Dixon,* the court held the search and seizure to be illegal, but concluded that a pound of cocaine, found days after the car was seized and discovered only when the cellular phone was being removed, was in plain view and admissible under that exception to the warrant requirement. 1 F.3d at 1084. In *Lasanta,* after concluding that the search and seizure was illegal, the court found it to be harmless error and affirmed the conviction. 978 F.2d at 1306. In *Linn,* the court found the warrantless seizure of a motor vehicle was reasonable because the mobility of the vehicle, in effect, created "exigent circumstances." 880 F.2d at 215 ("... the 'mobility' underpinning of the automobile exception is, of course, closely related to our 'exigent circumstances' analysis, and is the compelling factor.").

FN6. *See also O'Reilly v. United States,* 486 F.2d 208, 214 (8th Cir.), *cert. denied,* 414 U.S. 1043, 94 S.Ct. 546, 38 L.Ed.2d 334 (1973); *In re: Warrant to Seize One 1988 Chevrolet Monte Carlo,* 861 F.2d 307, 311 (1st Cir.1988) (notes the continuing validity of *United States v. Pappas,* 613 F.2d 324, 330 (1st Cir.1979), where court held that the federal forfeiture statute would only be constitutional if construed to allow seizure "only when seizure immediately follows the occurrence that gives the federal agents probable cause ... and the exigencies of the surrounding circumstances make the

requirement of obtaining process unreasonable or unnecessary").

FN7. In *United States v. Bagley,* 772 F.2d 482 (9th Cir.1985), the court appears to abandon *McCormick* and *Spetz* relying on *California v. Carney,* 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Both *Bagley* and *Carney,* however, involve cases where the police had reasonable grounds to believe that either contraband or evidence would be found in the vehicle at the time of the seizure or search. Such a reasonable belief did not exist in this case.

FN8. In *U.S. v. Decker,* 19 F.3d 287 (6th Cir.1994), relied on by the majority, the vehicles were properly seized pursuant to a warrant, and the focus concerned the propriety of the inventory after the vehicle was searched. I do not quarrel with the legitimacy of the inventory search but unlike *Decker,* in the instant case, the legality of the seizure is at issue.

No. 98-223

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF FLORIDA,

Petitioner,

vs.

TYVESSEL TYVORUS WHITE,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, TYVESSEL TYVORUS WHITE, moves this court for leave to proceed in forma pauperis, and in support of this request, shows as follows:

1. Attached to this Motion is Respondent's affidavit setting forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Respondent was adjudged insolvent for the purposes of appeal in the District Court of Appeal, First District of Florida, and the Florida Supreme Court, and was represented there by appointed counsel.

10 pp

WHEREFORE, Respondent respectfully requests that he be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

DAVID P. GAULDIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, DAVID P. GAULDIN, a member of the Bar of the Supreme Court of the United States and counsel of record for TYVESSEL TYVORUS WHITE, the Respondent, hereby certify that on the 14th day of October, 1998, I served a single copy of the foregoing Motion for Leave to Proceed In Forma Pauperis on each of the parties as follows:

On the State of Florida, The Petitioner, by U.S. Mail to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, FL, 32399.

DAVID P. GAULDIN
Assistant Public Defender
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

Member Of The Bar Of The
United States Supreme Court

No. 98-223

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF FLORIDA,

Petitioner,

vs.

TYVESSEL TYVORUS WHITE,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, TYVESSEL TYVORUS WHITE, being first duly sworn, deposed and say that I am the TYVESSEL TYVORUS WHITE in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present are as stated in the response to the State of Florida's petition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding on this response to the State of

Florida's petition for certiorari are true.

1. Are you presently employed? YES: ✓ NO: ____

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer? $1640.00 Tulima Equip 11801 Elyssa Ln Tinley Park IL 33592

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? YES: ____ NO: ✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings accounts? YES: ____ NO: /

   a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? YES: ____ NO: /

   a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependant upon you for support and state your relationship to those persons. _____
   Michelle White - Father
   Tyrell White - Father

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Tyvessel T. White
TYVESSEL TYVORUS WHITE
Respondent

STATE OF FLORIDA,
COUNTY OF Hillsborough

The foregoing affidavit of TYVESSEL TYVORUS WHITE, was subscribed and sworn to before me this 8th day of Sept., 1998.

NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

REBECCA W WATSON
My Commission CC425775
Expires Dec 12, 1998
Bonded by ANB
800-852-5878

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

NO. 98-223

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

DAVID P. GAULDIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR RESPONDENT

(MEMBER OF THE BAR OF THIS COURT)

QUESTION PRESENTED

Petitioner, the State of Florida, presents the following question:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A WARRANT IS REQUIRED BY THE FOURTH AMENDMENT TO SEIZE A MOTOR VEHICLE UNDER A CONTRABAND FORFEITURE ACT AND FOR SUBSEQUENT SEARCH OF SAID VEHICLE CONFLICTS WITH DECISIONS OF THE COURT IN CARROLL V. UNITED STATES, CALERO-TOLEDO V. PEARSON YACHT LEASING, AND COOPER V. CALIFORNIA, THAT OF THE ELEVENTH CIRCUIT IN UNITED STATES V. VALDES AND THE MAJORITY OF STATE COURTS ADDRESSING THIS ISSUE?

Respondent, Tyvessel Tyvorus White, restates the question presented as follows:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A STATE OF FLORIDA CITIZEN'S PROPERTY IS PROTECTED BY THE FEDERAL AND FLORIDA CONSTITUTIONS AGAINST WARRANTLESS SEIZURE EVEN WHEN THE SEIZURE IS DONE PURSUANT TO A STATUTORY SCHEME FOR FORFEITURE CONFLICTS WITH HOLDINGS OF THIS COURT TO THE CONTRARY?

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TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

OPINION BELOW

The Florida Supreme Court's opinion is reported as White v. State, 710 So.2d 949 (Fla. 1998). Respondent's appendix contains a copy of the Florida Supreme Court's decision and will be referred to by the letter "A" followed by the appropriate page number.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's constitutional and statutory provisions involved with the addition of the following:

Article I, Section 9 of the Florida Constitution provides Section 9. Due process. -- No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

STATEMENT OF THE CASE AND FACTS

A more complete rendition of the material facts as found in the Florida Supreme Court's opinion, including relevant deleted footnotes, follows:

> MATERIAL FACTS[1]
>
> On October 14, 1993, petitioner Tyvessel Tyvorus White (White) was arrested at his place of employment on charges unrelated to this case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officer seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been used several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture

[1]The following facts are taken from the First District's opinion. *White*, 680 So.2d at 551-55.

by the government.[2] After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.

Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine; and subsequently the trial court formally denied White's objection and motion to suppress the cocaine evidence.

On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993)(hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures. [Footnote 3 omitted] In dissent, Judge Wolf asserted that the "warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as a result of prior narcotics transactions." *White*, 680 So.2d at 557 (Wolf, J., concurring in part and dissenting in part).

Because the court found that neither this Court nor the United States Supreme Court had addressed the issue of whether law enforcement agencies must obtain a warrant prior to seizing a citizen's property under the Florida Contraband Forfeiture Act, the First District certified the issue as one of great public importance to this Court. [A-2-3]

[2]The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993. We commend the State's candor in providing these dates during oral argument. As both parties noted at oral argument, the record is unclear as to the actual dates. The State noted that these dates are contained in White's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850.

REASONS FOR NOT GRANTING THE WRIT

The decision of the Florida Supreme Court is not in direct conflict with decisions of this Court that no warrant is required under the Fourth Amendment to seize, search and forfeit a motor vehicle pursuant to a civil forfeiture act.

Essentially, Petitioner requests this Court to take jurisdiction and to quash the holding of the Florida Supreme Court on the basis that the Florida opinion conflicts with

decisions of this Court, the Eleventh Circuit, and the majority of state courts addressing the issue of whether a warrant is required prior to a seizure of an automobile under a contraband forfeiture statute.

The Petitioner argues that under the Florida Constitution there can be no independent and state ground for the Florida Supreme Court's decision in this case because under Article I, Section 12 of the Florida Constitution, Fourth Amendment issues in the Florida courts must be decided in conformity with decisions of this court, and the Florida courts can afford no higher level of Fourth Amendment protection.[3]

As noted by the Florida Supreme Court, prior to its decision on this issue, neither it nor this Court has addressed the issue of whether law enforcement agencies must obtain a warrant prior to seizing a citizen's property under the Florida Contraband Forfeiture Act. (A-3). Because this Court has not previously addressed this issue, the Florida Supreme Court was free to follow its own precedent. Rolling v. State, 695 So.2d 278, 293 n. 10 (Fla. 1997).

The Petitioner erroneously argues that this Court has addressed the same issues addressed by the Florida Supreme Court

[3]Petitioner cites Bernie v. State, 524 So.2d 988,990-991 (Fla. 1988) and the Florida Supreme Court's decision which explicitly recognized this constraint in its decision. (A-8, note 3).

in its decision in this Court's decisions of Carroll et al v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.543 (1925), Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), and Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

The issue presented to the Florida Supreme Court in the opinion involving Respondent was whether under the Florida Contraband Forfeiture Act probable cause to forfeit the vehicle (without more) was sufficient to justify a warrantless seizure of the vehicle. That issue was never presented nor contemplated in this Court's decision in Carroll v. United States.

In Carroll, this Court concluded that the government had probable cause to believe that contraband was presently being transported and that because of exigent circumstances created by the mobility of a vehicle, immediate seizure was permissible. The "probable cause" involved in Carroll was not probable cause that the vehicle was subject to forfeiture, but probable cause that at the time of the seizure the vehicle carried contraband goods (prohibited alcohol).

As this Court noted in Carroll, the "...main purpose of the act [involved in Carroll] obviously was to deal with the liquor and its transportation, and to destroy it." [267 U.S. 154]. This Court concluded in Carroll that probable cause existed to believe "...that intoxicating liquor was being transported in the

automobile which" the agents stopped and searched. [Emphasis added; 267 U.S. 162].

It is clear from the context of Carroll that the probable cause involved was probable cause to believe that contraband was presently being transported by the vehicle. In that light, this Court went on to caution that otherwise warrantless seizures were disfavored:

> In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the Court probable cause. United States v. Kaplan, (D.C.), 286 F. 963, 972. [Carroll at 267 U.S. 156].

Clearly, Carroll does not support Petitioner's contention that the Florida Supreme Court's opinion conflicts with a decision of this Court and that as a result this Court should accept jurisdiction.

This Court's holding in Calero-Toledo v. Pearson Yacht Leasing Co., supra, likewise in no way conflicts with the holding of the Florida Supreme Court's decision in this case. In Calero-Toledo, this Court specifically noted in footnote 14 that: "We have no occasion to address the question whether the Fourth

Amendment warrant or probable-cause requirements are applicable to seizures under the Puerto Rican statutes." 416 U.S. 679, 40 L.Ed.2d at 466.

Calero-Toledo v. Pearson Yacht Leasing Co. was decided under federal constitutional due process requirements, and as will be argued below, the decision by the Florida Supreme Court was bottomed in part, at least, upon Florida Constitutional due process requirements.

Finally, the Florida Supreme Court's decision does not conflict with Cooper v. California. In Cooper, although this Court upheld an inventory search of a car which had been seized pursuant to a California forfeiture statute, the legality of the seizure (as opposed to the search) was never at issue.

Contrary to the implication of Petitioner's petition to this Court, the Florida Supreme Court's decision was bottomed upon both the Federal and Florida Constitutions:

> In summary, we answer the certified question in the affirmative and hold that the warrantless seizure of a citizen's property is protected by the federal and Florida constitutions even when the seizure is made pursuant to a statutory forfeiture scheme. [A-5, Emphasis added].

The Florida Supreme Court's decision was essentially split into two parts under the headings "Department of Law Enforcement" and "Automobile Exception." The former involved the discussion of

state due process principles, the latter Fourth Amendment analysis.

The heading "Department of Law Enforcement" refers to the Florida Supreme Court's decision in Department of Law Enforcment v. Real Property, 588 So.2d 957 (Fla. 1991). With limitations and restrictions as explained in that opinion, that opinion upheld the constitutionality of the Florida Contraband Forfeiture Act both as to real property and (as involved here) to personal property.

Involved in Department of Law Enforcement were basic due process rights under the Florida Constitution under Article I, Section 9, Florida Constitution. Id. at 964.

With that as background, it is clear that the Florida Supreme Court's decision in this case was bottomed not only upon Fourth Amendment principles but upon state constitutional due process principles as embodied in Article I, Section 9, Florida Constitution. Indeed, the Florida Supreme Court made this clear in reference to Department of Law Enforcement:

> In *Department of Law Enforcement*, we were able to uphold the constitutionality of Florida's forfeiture act only by imposing numerous restrictions and safeguards on the use of the act in order to protect a citizen's property from arbitrary action by the government. In discussing the act we declared:
>
> The Act raises numerous

> constitutional concerns that touch upon many substantive and procedural rights protected by the Florida Constitution. In construing the Act, we note that forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity. Therefore, this Court has long followed a police that it must strictly construe forfeiture statutes.

588 So.2d at 961. The major thrust of our holding was that in order to comply with constitutional due process requirements, the government must strictly observe a citizen's constitutional protections when invoking the drastic remedy of forfeiture of a citizen's property. In addition to expressly holding that the Fourth Amendment applies to forfeiture attempts by the government, we specifically explained:

> In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the court shall authorize seizure of the personal property if it finds probably cause to maintain the forfeiture act.

Id. at 965. We conclude that the

> government's unauthorized and warrantless seizure, absent exigent circumstances not established here, clearly violated the constitutional safeguards we recognized in *Department of Law Enforcement*.
>
> The government did not seek a warrant or an "ex part preliminary hearing" here in order to secure a neutral magistrate's determination of probable cause. The government just seized the property, thereby putting the property owner and any others claiming an interest in the property in the position of having to take affirmative action against the government in order to protect their rights. This is the very antithesis of the cautious procedure we mandated in *Department of Law Enforcement*. We simply cannot accept the government's position that it may act at anytime, anywhere, and regardless of the existence of exigent circumstances, or a change in ownership or possession, to seize a citizen's property once believed to have been used in illegal activity, without securing the authorization of a neutral magistrate. [Emphasis added]. [A-3].

Thus, the Florida Supreme Court has construed that the Florida Contraband Forfeiture Act is only constitutional under the State of Florida's constitution in the manner that the Florida Supreme Court has construed the act.

The second part of the Florida Supreme Court's opinion is

entitled "Automobile Exception." It is this part of the opinion that implicates the Fourth Amendment.

The Florida Supreme Court notes that the only basis for the unauthorized government seizure in this case was the "so-called Automobile Exception to the warrant requirement." (A-3). However, it is undisputed on the facts of this case that there was no probable cause to believe that contraband was in the vehicle at the time of its seizure (this was conceded by the Petitioner below) nor were there any exigent circumstances which rendered the Automobile Exception applicable here. (A-4).

The Petitioner complains that because the Florida Supreme Court has adopted the "minority view" as found in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992) as opposed to what the Petitioner terms the "majority view" in United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989),:

> ...there now exists in Florida the inherently anomalous situation that an automobile seized by state officers cannot be searched and forfeited without warrant as the Fourth Amendment is interpreted by the Florida Supreme Court, while that same automobile seized for identical reasons by federal officers, can be searched and forfeited without warrant under the Fourth Amendment, as interpreted by the Eleventh Circuit. [Petitioner's petition at 6].

No, that's not the case at all. Under the Florida Contraband

Forfeiture Act an automobile located in Florida may not be seized without a recognized exception to the Fourth Amendment. Under Title 21, United States Code Section 881, the result may differ depending upon which federal circuit the offending automobile is found, but conflicts amongst the federal circuits should be resolved by this Court in the federal context, not by a case which merely construes the Florida Contraband Forfeiture Act.

As the Florida Supreme Court noted in its opinion, this Court "...has purposely subjected the Fourth Amendment to only a 'few well-delineated exceptions.' Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971)." (A-5).

To date, unless this Court intends an expansion of those "well-delineated exceptions" heretofore announced, the "forfeiture exception" espoused by the Petitioner is not one of those recognized exceptions.

In this regard the Florida Supreme Court stated:

> ...[T]he absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the Automobile Exception inapplicable here. The exception does not apply when no probable cause exists and the police arrest either a sleeping suspect [as in] Lasanta, or a suspect at work with keys in his pocket. White. There simply was no concern presented here that an

> opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately. [A-4].

Thus, and unless this Court is interested in expanding the exceptions to a warrantless search under the Fourth Amendment, there is no need to grant the Petitioner's petition in this case and to expand the heretofore recognized exceptions to the warrant requirement under the Fourth Amendment.

As noted by the Florida Supreme Court's opinion, the Florida legislature certainly did not have the authority to expand the exceptions to the Fourth Amendment:

> [Footnote 7] As Chief Justice Kogan recently reminded us, the genius of our federal and state constitutions is that they define basic rights that neither the legislative nor executive branches can modify. Krischer v. McIver, 697 So.2d 97, 112 (Fla. 1997) (Kogan, C.J., dissenting). These remarkable documents fenced off from the "ordinary political process" these rights guaranteed all Americans by ensuring they "could not be repealed by a mere majority vote of legislators now nor...alter[ed] through any process except constitutional amendment." Id. at 112-113. [A-9].

CONCLUSION

The decision of the Florida Supreme Court is not in conflict with any well-established Fourth Amendment precedence as set forth by this Court. The Florida Supreme Court interpreted the Florida Contraband Forfeiture Act under both the due process provisions of the Florida state constitution and the Fourth Amendment. Any conflict that exists amongst the federal circuits should be decided by a petition from a federal court.

Respondent respectfully requests this Court to deny the State of Florida's petition for writ of certiorari.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

A P P E N D I X

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

APPENDIX

*949 710 So.2d 949

Tyvessel Tyvorus WHITE, Petitioner,
v.
STATE of Florida, Respondent.

No. 88813.

Supreme Court of Florida.

Feb. 26, 1998.

Rehearing Denied June 1, 1998.

Defendant was convicted in the Circuit Court, Bay County, Clinton Foster, J., of possession of cocaine, which was found during inventory search of his automobile following its warrantless seizure pursuant to Florida Contraband Forfeiture Act. Defendant appealed. The District Court of Appeal, 680 So.2d 550, affirmed and certified question. The Supreme Court, Anstead, J., held that: (1) warrantless seizure of citizen's property, including automobile, absent exigent circumstances, violates Fourth Amendment; and (2) automobile exception to warrant requirement was inapplicable to seizure of defendant's automobile.

Question answered.

1. SEARCHES AND SEIZURES⊂ 83
349 ----
349I In General
349k83 Seizure proceedings against property forfeited.

Fla. 1998.
Warrantless seizure of citizen's property, including automobile, absent exigent circumstances, violates Fourth Amendment right to be secure against unreasonable searches and seizures, even when seizure is made pursuant to statutory forfeiture scheme. U.S.C.A. Const.Amend. 4; West's F.S.A. Const. Art. 1, § 12; West's F.S.A. §§ 932.701-932.707.

2. DRUGS AND NARCOTICS⊂ 183(7)
138 ----
138II Narcotics and Dangerous Drugs
138II(D) Searches and Seizures
138k182 Search Without Warrant
138k183 Motor Vehicle Searches
138k183(7) Place and time of search; impoundment and inventory.

Fla. 1998.
Absence of probable cause to believe contraband was in vehicle, combined with lack of any other exigent circumstances, rendered automobile exception to warrant requirement inapplicable to seizure of defendant's automobile, where vehicle was parked safely at defendant's employment, government had keys to vehicle, and defendant was in custody on unrelated charges. U.S.C.A. Const.Amend. 4; West's F.S.A. Const. Art. 1, § 12; West's F.S.A. §§ 932.701-932.707.

3. SEARCHES AND SEIZURES⊂ 60.1
349 ----
349I In General
349k60 Motor Vehicles
349k60.1 In general.

Fla. 1998.
Automobile exception to warrant requirement is predicated upon existence of exigent circumstances consisting of known presence of contraband in automobile at the time, combined with likelihood that opportunity to seize contraband will be lost if it is not immediately seized because of mobility of automobile. U.S.C.A. Const.Amend. 4; West's F.S.A. Const. Art. 1, § 12.

4. SEARCHES AND SEIZURES⊂ 60.1
349 ----
349I In General
349k60 Motor Vehicles
349k60.1 In general.

Fla. 1998.
Automobile exception to warrant requirement is narrow, situation-dependent exception which requires more than fact that automobile is object sought to be seized and searched; there must be probable cause to believe contraband is in vehicle at time of search and seizure, and there must be some legitimate concern that automobile might be removed and any evidence within it destroyed in time warrant could be obtained. U.S.C.A. Const.Amend. 4; West's F.S.A. Const. Art. 1, § 12.

5. SEARCHES AND SEIZURES⊂ 64
349 ----
349I In General
349k60 Motor Vehicles

349k64 Emergencies or exigencies.

Fla. 1998.

Fourth Amendment mandates that absent exigent circumstances, police must secure warrant for search and seizure of automobile. U.S.C.A. Const.Amend. 4.

6. SEARCHES AND SEIZURES⊜ 44

349 ----

349I In General

349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

349k44 Presence of probable cause.

Fla. 1998.

No amount of probable cause can justify warrantless search or seizure absent exigent circumstances. U.S.C.A. Const.Amend. 4.

Nancy A. Daniels, Public Defender and David P. Gauldin, Assistant Public Defender, Second Judicial Circuit, Tallahassee, for Petitioner.

Robert A. Butterworth, Attorney General; James W. Rogers, Bureau Chief, Criminal Appeals and Daniel A. David, Assistant Attorney General, Tallahassee, for Respondent.

ANSTEAD, Justice.

We have for review the opinion in *White v. State*, 680 So.2d 550 (Fla. 1st DCA 1996). We accepted jurisdiction to answer the following question certified to be of great public importance:

*950 WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.

Id. at 555. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed below, we answer the certified question in the affirmative. We hold that a citizen's property is protected by the federal and Florida constitutions against warrantless seizure even when the seizure is done pursuant to a statutory scheme for forfeiture.

MATERIAL FACTS (FN1)

On October 14, 1993, petitioner Tyvessel Tyvorus White (White) was arrested at his place of employment on charges unrelated to this case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been used several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture by the government. (FN2) After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.

Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine; and subsequently the trial court formally denied White's objection and motion to suppress the cocaine evidence.

On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993) (hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures. (FN3) In dissent, Judge Wolf asserted that the "warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as a result of prior narcotics transactions." *White*, 680 So.2d at 557

(Wolf, J., concurring in part and dissenting in part).

*951 Because the court found that neither this Court nor the United States Supreme Court had addressed the issue of whether law enforcement agencies must obtain a warrant prior to seizing a citizen's property under the Florida Contraband Forfeiture Act, the First District certified the issue as one of great public importance to this Court.

LAW AND ANALYSIS

[1] In holding that no prior court authorization was required in order to seize and search White's vehicle, the First District majority applied the "automobile exception" to the warrant requirement. While we recognize the continuing validity of the "automobile exception" to the warrant requirement, we find it inapposite here.

In his dissent, Judge Wolf relied primarily on the opinion of the United States Court of Appeals for the Second Circuit in *U.S. v. Lasanta*, 978 F.2d 1300 (2d Cir.1992). (FN4) He also noted this Court's opinion in *Department* *952 *of Law Enforcement v. Real Property*, 588 So.2d 957, 963 n. 14 (Fla.1991), wherein we recognized that because "article I, section 12 of the Florida Constitution expressly requires conformity with the fourth amendment of the United States Constitution, the warrant requirement of article I, section 12 also applies to seizures in forfeiture actions under Florida law." *White*, 680 So.2d at 558 (Wolf, J., concurring in part and dissenting in part).

DEPARTMENT OF LAW ENFORCEMENT

In *Department of Law Enforcement*, we were able to uphold the constitutionality of Florida's forfeiture act only by imposing numerous restrictions and safeguards on the use of the act in order to protect a citizen's property from arbitrary action by the government. In discussing the act we declared:

> The Act raises numerous constitutional concerns that touch upon many substantive and procedural rights protected by the Florida Constitution. In construing the Act, we note that forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity. Therefore, this Court has long followed a policy that it must strictly construe forfeiture statutes.

588 So.2d at 961. The major thrust of our holding was that in order to comply with constitutional due process requirements, the government must strictly observe a citizen's constitutional protections when invoking the drastic remedy of forfeiture of a citizen's property. In addition to expressly holding that the Fourth Amendment applies to forfeiture attempts by the government, we specifically explained:

> In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the court shall authorize seizure of the personal property if it finds probable cause to maintain the forfeiture action.

Id. at 965. We conclude that the government's unauthorized and warrantless seizure, absent exigent circumstances not established here, clearly violated the constitutional safeguards we recognized in *Department of Law Enforcement*.

The government did not seek a warrant or an "ex parte preliminary hearing" here in order to secure a neutral magistrate's determination of probable cause. The government just seized the property, thereby putting the property owner and any others claiming an interest in the property in the position of having to take affirmative action against the government in order to protect their rights. This is the very antithesis of the cautious procedure we mandated in *Department of Law Enforcement*. We simply cannot accept the government's position that it may act at anytime, anywhere, and regardless of the existence of exigent circumstances, or a change in ownership or possession, to seize a citizen's property once believed to have been used in illegal activity, without securing the authorization of a neutral magistrate.

AUTOMOBILE EXCEPTION

[2] [3] As previously noted, the *only* basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement. The district court majority cited *California v. Carney*, 471 U.S. 386, 391, 105 S.Ct. 2066, 2069, 85 L.Ed.2d 406 (1985), for the proposition that automobiles are afforded less Fourth Amendment protection against warrantless searches

and seizures due to their "ready mobility" and diminished expectations of privacy due to their pervasive governmental regulation. The automobile exception is predicated upon the existence of exigent circumstances consisting of the known presence of contraband in the automobile at the time, combined with the likelihood that an opportunity to seize the contraband will be lost if it is not immediately seized because of the mobility of the automobile. *See Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). For example, in *Carney*, law enforcement officers had direct evidence (FN5) that illegal drugs were present and *953 that the suspect was distributing illegal drugs from the vehicle. Accordingly, the Court concluded that the officers "had abundant probable cause to enter and search the vehicle for evidence of a crime." *Carney*, 471 U.S. at 395, 105 S.Ct. at 2071.

Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that *Carney* and the automobile exception are inapposite as authority. There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity. The exigent circumstances implicit in the former situation are simply not present in the latter situation.

[4] The automobile exception is a narrow, situation-dependent exception which requires much more than the fact that an automobile is the object sought to be seized and searched. Critically, there must be probable cause to believe contraband is in the vehicle at the time of the search and seizure, *Carney*, (FN6) and there must be some legitimate concern that the automobile "might be removed and any evidence within it destroyed in the time a warrant could be obtained." *Lasanta*, 978 F.2d at 1305. The majority opinion below simply failed to address the fundamental requirement of *Carney*:

> In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate *so long as the overriding standard of probable cause [to believe contraband is in the vehicle] is met.*

471 U.S. at 392, 105 S.Ct. at 2070 (emphasis added).

As is vividly demonstrated in the *Lasanta* case, cited by Judge Wolf, the automobile exception does not apply to either the facts of that case or White's case. *See White*, 680 So.2d at 557 (Wolf, J., concurring in part and dissenting in part) (noting that White was arrested at his workplace, his car keys were in his pocket, and his car was parked outside in his company's parking lot). In *Lasanta*, the court could easily have been writing about this case when it described the obvious absence of exigent circumstances in the government's forfeiture seizure:

> The government does not even suggest that exigent circumstances might justify its warrantless seizure of the vehicle. *See, e.g., Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (outlining the automobile exception to the warrant requirement); *Carroll v. United States*, 267 U.S. 132, 146, 45 S.Ct. 280, 282, 69 L.Ed. 543 (1925) (noting rationale of automobile exception). Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep.

978 F.2d at 1305. Similarly, the absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here. The exception does not apply when no probable cause exists and the police arrest either a *954 sleeping suspect, *Lasanta*, or a suspect at work with the keys in his pocket. *White*. There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that

might be lost if not seized immediately.

SEIZURE OF PROPERTY VS. SEIZURE OF PERSON

Finally, the reasoning of the district court majority, that since a defendant's person can be seized without a warrant his property should be no different, simply proves too much. If we were to follow that reasoning to its logical conclusion we would, in essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property. (FN7) It will always be more intrusive to seize a person than it will be to seize his property. That is the nature of human values. However, such an approach would apparently have us do away with the constitutional law of search and seizure as to property entirely, simply because we have permitted the warrantless arrest of a person.

[5] [6] The United States Supreme Court has purposely subjected the Fourth Amendment to only a "few well-delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971). For example, the courts have carefully restricted the law of search and seizure to permit a limited search of an arrestee and his person "incident" to a valid arrest. *See Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). However, the reasoning of the district court majority, if carried to its logical bounds, would do away with the limitations established to a search incident to a lawful arrest and now permit a search of anything, anywhere, based upon probable cause, without a warrant, since those actions involving property would obviously be less intrusive than seizing the person. Obviously, we are not willing to accept such a proposition and its implications. (FN8)

CONCLUSION

In the end, the maintenance of an orderly society mandates that a citizen's property should not be taken by the government, in the absence of exigent circumstances, without the intervention of a neutral magistrate. ***955** Certainly the warrant requirement would have posed no undue burden on the government here where the vehicle was parked safely at the petitioner's place of employment and the government had the keys and the petitioner in custody. Moreover, any inconvenience to the government pales in comparison to the consequences for our justice system and constitutional order if such abuses are left unchecked. *See Department of Law Enforcement.* As the Second Circuit poignantly observed in *Lasanta*, 978 F.2d at 1305, "it would, indeed, be a Pyrrhic victory for the country, if the government's imaginative use of that weapon [civil forfeiture] were to leave the constitution itself a casualty."

In summary, we answer the certified question in the affirmative and hold that the warrantless seizure of a citizen's property is protected by the federal and Florida constitutions even when the seizure is made pursuant to a statutory forfeiture scheme. Accordingly, we quash the First District's opinion and remand this case for proceedings consistent herewith.

It is so ordered.

KOGAN, C.J., SHAW and HARDING, JJ., and GRIMES, Senior Justice, concur.

WELLS, J., dissents with an opinion in which OVERTON, J., concurs.

WELLS, Justice, dissenting.

For more than twenty-three years, Florida's forfeiture statute has been enforced by Florida courts, including this Court, as the legislature wrote it. Today, by this decision, the majority judicially amends this twenty-three-year-old statute and places Florida in the minority of federal and state jurisdictions, which require a preseizure warrant in order to enforce forfeiture statutes. Today's decision also puts our state procedure at odds with federal forfeitures in Florida since the Eleventh Circuit is among the majority of jurisdictions which recognize that warrantless seizures pursuant to forfeiture statutes are not in violation of the Fourth Amendment to the United States Constitution.

I dissent because I agree with the majority of jurisdictions and the Eleventh Circuit and do not believe that this change in the law of Florida is suddenly required by the Fourth Amendment. The case of *United States v. Lasanta*, 978 F.2d 1300 (2d Cir.1992), upon which the majority opinion relies, is clearly the minority view.

The seizure in this case was not an unusual

enforcement of Florida's forfeiture law or contrary to forfeitures which the appellate courts of Florida have approved since the inception of the statute. Clearly, the period of time between when the police eyewitnesses and the video-tape evidence showed the vehicle being used in the delivery and sale of cocaine and the seizure of the vehicle was within previous approvals by Florida courts. Soon after the forfeiture statute became effective on October 1, 1974, it was recognized that proof of past violations may be the basis for forfeiture. *State v. One 1977 Volkswagen*, 455 So.2d 434 (Fla. 1st DCA 1984) (police properly seized a vehicle based upon drug transaction occurring almost two months prior to seizure), *approved*, 478 So.2d 347 (Fla.1985); *Knight v. State*, 336 So.2d 385, 387 (Fla. 1st DCA 1976), *cert. denied*, 345 So.2d 424 (Fla.1977).

In 1983, the Second District directly confronted the issue of whether a preseizure warrant needed to be obtained. The Second District held that it did not in *State v. Pomerance*, 434 So.2d 329, 330 (Fla. 2d DCA 1983), stating:

> We have found no case addressing this issue. However, section 932.703, Florida Statutes (1981) , which provides for the forfeiture of motor vehicles used to transport, conceal, or facilitate the sale of contraband, in violation of section 932.703, nowhere mentions obtaining a warrant; it simply states that an offending vehicle "shall be seized." *We know of no rationale for judicially engrafting onto the statute a requirement that a warrant be obtained.*
>
> (Emphasis added.)

In 1985, in *Duckham v. State*, 478 So.2d 347 (Fla.1985), this Court did an analysis of the forfeiture statute and cases from our district courts and federal circuit courts and upheld the forfeiture of a motor vehicle seized almost two months after the vehicle had been used to facilitate a drug transaction. ***956** It is important to note that this seizure of the motor vehicle was not based upon there being probable cause to believe that there was contraband in the vehicle at the time of or before its seizure. The district court's decision in *Duckham* was approved with this Court noting:

> Even though no drugs had been transported in the car, no conversations had taken place in the car, the policeman had never been in the car, and Duckham used the car solely to transport himself to the restaurant where he struck the deal and then to his apartment, the district court found that Duckham used his car to facilitate the sale of contraband within the meaning of subsection 932.702(3), Florida Statutes (1981).
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> 478 So.2d at 348.

Also in 1985, this Court upheld the forfeiture statute against a due-process attack in *Lamar v. Universal Supply Co., Inc.*, 479 So.2d 109 (Fla.1985). This Court specifically stated:

> The seizure of property pursuant to a forfeiture statute constitutes an extraordinary situation in which postponement of notice and hearing until after seizure does not deny due process. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). The due process rights of claimants are adequately protected, therefore, by the requirement that the state attorney promptly file a forfeiture action following seizure. § 932.704(1), Fla. Stat. (1983).
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> 479 So.2d at 110.

In 1989, in an opinion written by Justice Overton, this Court did another extensive analysis of this statute in *State v. Crenshaw*, 548 So.2d 223 (Fla.1989), and strongly upheld the enforcement of this statute.

The majority here cites to this Court's 1991 analysis of the forfeiture statute in *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla.1991). However, the majority's quote omits the following sentence which completes the paragraph from which the quote in the majority opinion is taken: "In those situations where a law enforcement agency already has lawfully taken possession of personal property during the course of routine police action, the state has effectively made an ex parte seizure for the purposes of initiating a forfeiture action." 588 So.2d at 965. Through the date of that opinion (in fact until today) law enforcement agencies were considered to have lawfully taken possession of personal property when possession was taken on the basis of and in conformity with the forfeiture statute. *Lamar*, 479 So.2d at 110.

When *Department of Law Enforcement* is read in

full context, that decision cannot be fairly said to engraft a warrant requirement into the statute. This was the reading given to that decision by the Second District in *In re Forfeiture of 1986 Ford*, 619 So.2d 337, 338 (Fla. 2d DCA 1993), when it held that "nothing in [*Department of Law Enforcement*] or the forfeiture statute requires a warrant, consent or exigent circumstances."

Furthermore, the majority opinion here incorrectly states that "the *only* basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement." Majority op. at 952. What the district court actually said was, "We are also influenced in our holding by the fact that the property seized here was a motor vehicle...." *White v. State*, 680 So.2d 550, 554 (Fla. 1st DCA 1996). The district court's opinion therefore correctly pointed out that privacy interests in a motor vehicle have a lesser degree of Fourth Amendment protection because of a vehicle's mobility and because the expectation of privacy is less than that relating to one's home or office, citing to *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). The statement by the district court majority is indisputably correct.

However, the clear reason for the district court majority's decision is the compelling development of precedent in Florida in respect to the statute, which the majority in this Court simply casts aside without mention, and the weight of authority from both federal and state jurisdictions, which the majority fails to acknowledge. One case representing the majority view is from the Eleventh Circuit: *United States v. Valdes*, 876 F.2d 1554 (11th Cir.1989). The district court majority followed the reasoning of the Eleventh *957 Circuit in *Valdes*. The rejection of *Valdes* by this Court's majority places Florida in the illogical (and I believe untenable) situation of there being a warrantless seizure available to federal law enforcement pursuant to the federal forfeiture statute because it is not a violation of the Fourth Amendment to the United States Constitution and a warrantless seizure not being available to Florida law enforcement pursuant to a substantially similar state forfeiture statute because of a holding by this Court that a warrantless seizure is in violation of the Fourth Amendment to the United States Constitution. Though we are not bound to do it, I believe this Court should apply the Fourth Amendment to the United States Constitution in accord with its application by the federal circuit court that has Florida within its jurisdiction. This is particularly so when the Eleventh Circuit's decision is in accord with the majority of other jurisdictions.

I believe the Seventh Circuit clearly expressed correctly the state of the law in federal and state jurisdictions in *United States v. Pace*, 898 F.2d 1218, 1241 (7th Cir.1990), when it said:

> *The weight of authority, however, holds that police may seize a car without a warrant pursuant to a forfeiture statute if they have probable cause to believe the car is subject to forfeiture. See, e.g., United States v. Valdes*, 876 F.2d 1554, 1558-60 (11th Cir.1989); *United States v. $29,000--U.S. Currency*, 745 F.2d 853, 856 (4th Cir.1984); *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297, 1302 (5th Cir.1983); *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 158 (3d Cir.1981); *United States v. One 1975 Pontiac Lemans*, 621 F.2d 444, 450 (1st Cir.1980) (citing cases). We agree with the majority approach. The federal courts' overwhelming approval of warrantless forfeiture seizures based on probable cause, along with the historical acceptance of the constitutionality of such searches, are evidence that such searches have been generally accepted as reasonable. *See United States v. Bush*, 647 F.2d 357, 370 (3d Cir.1981) (citing cases). It is difficult to ignore this general acceptance. Furthermore, under a civil forfeiture statute, "the vehicle ... is treated as being itself guilty of wrongdoing." *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 454 (7th Cir.1980). Thus, seizing a car from a public place based on probable cause is analogous to arresting a person outside the home based on probable cause. Such an arrest, even without a warrant, does not violate the Fourth Amendment, although it is possibly a more significant intrusion on privacy interests than seizing an unoccupied car. *See Bush*, 647 F.2d at 370 (citing *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)); *see also Valdes*, 876 F.2d at 1559; *One 1978 Mercedes Benz*, 711 F.2d at 1302. And the Supreme Court has approved warrantless seizures in a similar situation. In *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), Internal Revenue Service agents seized cars subject to tax liens without a warrant. The Court held that the seizures did not violate the Fourth Amendment;

> the agents had probable cause to believe that the cars were subject to seizure, and the seizures took place "on public streets, parking lots, or other open places." *See id.* at 351-52, 97 S.Ct. at 627-28; *G.M. Leasing* provides strong support for the majority position. *See One 1975 Pontiac Lemans*, 621 F.2d at 450, which adopted the panel's reasoning in *United States v. Pappas*, 600 F.2d 300, 304 (1st Cir.), *vacated* 613 F.2d 324 (1st Cir.1979); *Bush*, 647 F.2d at 369; *see also* 3 Wayne R. LaFave, *Search and Seizure* § 7.3(b), at 83 (2d ed.1987). For all these reasons, we conclude that it was proper for the police to seize Pace's and Besase's cars from the parking lot of Davides' condominium complex, if the police had probable cause to believe the cars were subject to forfeiture.
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> (Emphasis added; footnote omitted.) *See also United States v. Musa*, 45 F.3d 922, 924 (5th Cir.1995). I would continue Florida's adherence to this view.

Assuming that the warrantless seizure was authorized, there is no doubt that the inventory search was appropriate. *See Caplan v. *958. State*, 531 So.2d 88 (Fla.1988); *Padron v. State*, 449 So.2d 811 (Fla.1984).

OVERTON, J., concurs.

FN1. The following facts are taken from the First District's opinion. *White*, 680 So.2d at 551-55.

FN2. The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993. We commend the State's candor in providing these dates during oral argument. As both parties noted at oral argument, the record is unclear as to the actual dates. The State noted that these dates are contained in White's motion for postconviction relief under Florida Rule of Criminal Procedure 3.850.

FN3. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amend. IV, U.S. Const. In 1982, article I, section 12 of the Florida Constitution was amended to add what has become known as the conformity clause because "we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and provide no greater protection than those interpretations." *Bernie v. State*, 524 So.2d 988, 990-91 (Fla.1988); *see Soca v. State*, 673 So.2d 24, 27 (Fla.), *cert. denied*, --- U.S. ----, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996).

FN4. Because *Lasanta* contains a comprehensive and reasoned treatment of this issue, we quote from the Second Circuit's opinion at length:

> A threshold question presented here is whether the government's seizure of the car, without a warrant, as a civil forfeiture, was authorized. The forfeiture statute, 21 U.S.C. § 881, gives power to the attorney general to seize for forfeiture, *inter alia*, a vehicle that is used to facilitate a narcotics transaction. In carrying out such a statutorily authorized seizure, however, agents of the attorney general must also obey the constitution, particularly the fourth amendment's command that there be no unreasonable seizures.
>
> ....
>
> We find no language in the fourth amendment suggesting that the right of the people to be secure in their "persons, houses, papers, and effects" applies to all searches and seizures except civil-forfeiture seizures in drug cases. U.S. Const. amend. IV. We reject out of hand the government's argument that congress can conclusively determine the reasonableness of these warrantless seizures, and thereby eliminate the judiciary's role in that task of constitutional construction. *See* U.S. Const. art. VI, cl. 2. While congress may have intended civil forfeiture to be a "powerful weapon in the war on drugs", *United States v. 141st Street Corp. by Hersh*, 911 F.2d 870, 878 (2d Cir.1990) (noting statute's legislative history), *cert. denied*, 498 U.S. 1109, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991), it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the constitution itself a casualty.
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> ....
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> To be valid, therefore, this warrantless seizure

must meet one of the recognized exceptions to the fourth amendment's warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971). Surely the government cannot argue that the canister, tucked underneath the driver's seat, was found in the plain view of an investigative officer in a place she was entitled to be. *See, e.g., Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) (explaining the elements of a plain-view seizure). Nor does the government claim that the search was incident to Cardona's arrest, which occurred on the doorstep of Cardona's home. *See, e.g., Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2039-40, 23 L.Ed.2d 685 (1969) (police may search arrestee's person and area within his immediate control incident to arrest). The substantial distance between the site of Cardona's arrest and the vehicle in the driveway forecloses any question of the agents' need to search the vehicle for weapons to ensure their safety during the arrest. *Chimel*, 395 U.S. at 763, 89 S.Ct. at 2040 (noting that safety animates this seizure rationale).

The government does not even suggest that exigent circumstances might justify its warrantless seizure of the vehicle. *See, e.g., Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (outlining the automobile exception to the warrant requirement); *Carroll v. United States*, 267 U.S. 132, 146, 45 S.Ct. 280, 282, 69 L.Ed. 543 (1925) (noting rationale of automobile exception). Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep.

Nor was it impractical for the agents to obtain a warrant to seize Cardona's car. *See, e.g., United States v. Paroutian*, 299 F.2d 486, 488 (2d Cir.1962) (search upheld when exceptional circumstances rendered it impractical to secure warrant). Previous surveillance had made agents aware of the vehicle's presence, thus enabling them to have requested and obtained a search warrant during either of their two attempts to secure a warrant to arrest Cardona. Even if the agents had been surprised by the presence of the limousine, and even if they harbored probable cause to suspect it contained evidence of narcotics-related activity, they still could have posted an agent to remain with the vehicle, and then secured a search warrant.

Id. at 1303-06. This reasoning is sound and speaks for itself.

*958 FN5. A young man who had just left the motor home only moments before told agents of the Drug Enforcement Administration that he had received marijuana from the suspect while in the motor home. *Carney*, 471 U.S. at 388, 105 S.Ct. at 2067.

FN6. *See also Pennsylvania v. Labron*, 518 U.S. 938, 940-41, 116 S.Ct. 2485, 2487, 135 L.Ed.2d 1031 (1996) (reaffirming *Carney* in reasoning that if a car "is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more"); *California v. Acevedo*, 500 U.S. 565, 580, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991) (holding that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained").

FN7. As Chief Justice Kogan recently reminded us, the genius of our federal and state constitutions is that they define basic rights that neither the legislative nor executive branches can modify. *Krischer v. McIver*, 697 So.2d 97, 112 (Fla.1997) (Kogan, C.J., dissenting). These remarkable documents fenced off from the "ordinary political process" these rights guaranteed all Americans by ensuring they "could not be repealed by a mere majority vote of legislators nor ... alter[ed] through any process except constitutional amendment." *Id.* at 112-13.

FN8. As Judge Wolf correctly observed in his dissent below, the Fourth Amendment mandates that absent exigent circumstances, police must secure a warrant for the search and seizure of an automobile. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Indeed, *Coolidge's* holding remains good law to the extent that "no amount of probable cause can justify a warrantless search or seizure absent

'exigent circumstances.' " *Id.* at 468, 91 S.Ct. at 2039. Moreover, in the case that overruled *Coolidge* in part, *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the Supreme Court not only reaffirmed *Coolidge's* essential holding but also noted that it had extended "the same rule to the arrest of a person in his home." *Id.* at 137 n. 7, 110 S.Ct. at 2308 n. 7. Therefore, since no exigent circumstances existed in this case, the warrantless seizure of White's car was unconstitutional. *See Coolidge*, 403 U.S. at 454-55, 91 S.Ct. at 2031-32 (reaffirming rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--*subject only to a few specifically established and well-delineated exceptions* ") (emphasis added). Even though automobiles are afforded lesser Fourth Amendment protection, there is still a strong presumption against warrantless searches and seizures of a citizen's property by the government, absent exigent circumstances. *See Coolidge*, 403 U.S. at 468, 91 S.Ct. at 2039 (reiterating that "even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure"). *Coolidge's* requirement that a "plain view" seizure must also be "inadvertent" was overruled in *Horton*, 496 U.S. at 140, 110 S.Ct at 2310. Minus that incidental reasoning, *Coolidge* remains good law.

CASE NO. 98-223

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

STATE OF FLORIDA,

Petitioner,

vs.

TYVESSEL TYVORUS WHITE,

Respondent.

CERTIFICATE OF SERVICE

I, DAVID P. GAULDIN, a member of the Bar of the Supreme Court of the United States and counsel of record for TYVESSEL TYVORUS WHITE, the Respondent, hereby certify that on the 14th day of October, 1998, pursuant to Supreme Court Rule 29, I served a single copy of the foregoing Brief of Respondent in Opposition to the State of Florida's Petition for Writ of Certiorari to the Supreme Court of Florida on each of the parties as follows:

On the State of Florida, The Petitioner, by U.S. Mail to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, 32399.

DAVID P. GAULDIN
Assistant Public Defender
Leon County Courthouse
Tallahassee, Florida 32301
(850) 488-2458

Member Of The Bar Of The
United States Supreme Court

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

Case No. 98-223

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	AFFIDAVIT OF FILING BY FIRST CLASS UNITED STATES MAIL PURSUANT TO RULE 29.2
TYVESSEL TYVORUS WHITE,	:	
Respondent.	:	
	:	

CAME AND APPEARED BEFORE ME, the undersigned authority, DAVID P. GAULDIN, Assistant Public Defender, Attorney for Respondent, who first being duly sworn, deposes and says:

That on OCTOBER 14, 1998, he placed in a United States Post Office Box, with first class postage prepaid, a copy of the Respondent's Brief in Opposition to the State of Florida's Petition for Writ of Certiorari to the Supreme Court of Florida in the above-referenced case, and the original of said Brief was duly and properly addressed to the Clerk of the United States Supreme Court. Further, he is a duly sworn and authorized member of the Bar of this Court.

DAVID P. GAULDIN
Assistant Public Defender
Attorney for Petitioner

STATE OF FLORIDA,

COUNTY OF Leon

SWORN TO AND SUBSCRIBED to before me this 14th day of October, 1998, at Tallahassee, Leon County, Florida.

Deloris M. McCoy

NOTARY PUBLIC, State of Florida at Large.

My Commission Expires: 3/15/02

Deloris M. McCoy
MY COMMISSION # CC724442 EXPIRES
March 15, 2002
BONDED THRU TROY FAIN INSURANCE, INC.

____V____ Personally Known

_____ Produced Identification

Type of ID Produced _____

Case No. 98-223

In The
Supreme Court Of The United States
October Term 1998

STATE OF FLORIDA, *Petitioner*,

v.

TYVESSEL TYVORUS WHITE, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN SNURKOWSKI*
DANIEL A. DAVID
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
Counsel for Petitioner

NANCY DANIELS
PUBLIC DEFENDER

DAVID GAULDIN*
Leon County Courthouse
Tallahassee, FL 32301
(850) 488-2458
Counsel for Respondent

*Counsel of Record

Petition for Certiorari Filed July 31, 1998
Certiorari Granted November 16, 1998

87pp

TABLE OF CONTENTS

93-2100 (

2

PR[illegible] [illegible]LE CAUSE AFFIDAVIT / ARREST / NOTIC[illegible] [illegible] APPEAR

0 0 0 6 2 2 8 3 1 5

PANAMA CITY P.D.

2 4 3 4 2 9 3

SAM'S CLUB 23RD ST. PANAMA CITY, FL.

1707 W. 23RD ST. PANAMA CITY, FLA. SAM'S CLUB

1 0 1 4 9 3 0 8 3 0

1

2

PIERCE #63

WHITE, TYVESSEL TYVORUS

B M 0 8 0 3 6 4 6'1" 190 BRO BLK RED RED

4004 E. 11TH ST. PANAMA CITY, FLA.

2

SAM'S CLUB PANAMA CITY, FLA.

STOCKER

263-77-9929

PANAMA CITY, FL U.S.

POSSESSION COCAINE

1

893.13

2-ROCKS

[illegible] DAY OCTOBER 93 8:30 [illegible] IN PANAMA CITY, BAY COUNTY, FLORIDA.

SPECIFICALLY 1707 W. 23RD ST., SAM'S CLUB. THE ABOVE NAMED DEFENDANT WAS ARRESTED

ON A SIGNED COMPLAINT FOR SALE OF COCAINE. A SEARCH OF THE DEFENDANT'S VEHICLE

REVEALED TWO CRACK COCAINE ROCKS CONCEALED IN THE ASHTRAY. THE ABOVE NAMED DEFEDANTS

VEHICLE WAS BEING SEIZED BY THIS OFFICER FOR USE IN THE COMMISSION OF A FELONY ON THE

OTHER CHARGES. A FIELD TEST SHOWED A POSITIVE REACTION TO THE PRESENCE OF COCAINE.

DUE TO THE ABOVE STATED FACTS YOUR AFFIANT BELIEVES THE DEFENDANT IS IN VIOLATION

OF F.S. 893.13 TO WIT POSSESSION OF COCAINE.

FILED OCT 15 11 24 AM '93

14th OCTOBER 93

[signature] #62

[signature] #63

JOHN D. PIERCE #63

1

IN THE COUNTY COURT/CIRCUIT COURT
IN AND FOR B. COUNTY, FLORIDA
PCP.D. 06-6228219

STATE OF FLORIDA
Vs.

Tyevessel Tyuacus White

AFFIDAVIT OF INSOLVENCY

STATE OF FLORIDA, COUNTY OF BAY

Before the undersigned Judge, personally appeared the Defendant, who being first duly sworn, deposes and says that he is the defendant in the above styled cause, that he has been advised that he may be held to answer to the Court, that he is insolvent, that he has no income or property that would permit him to employ an attorney, that he has not disposed of any property for the purpose of taking advantage of this oath, that he does desire to have an attorney to represent him, that he desires that this Court appoint the Public Defender of the 14th Judicial Circuit to represent him in this cause, that the following statements regarding his marital status, residence, employment, and financial status are true and correct:

I. PERSONAL STATUS:

a. Single ✓ Married____ Separated____ Divorced____

b. Dependant's Wife____ Children, No. 2 Others, No.____ And Relationship____

c. Date of Birth 10364 Age 29 Highest Grade Achvd. or Educational Level 11th

II. RESIDENCE:

Defendant's address:

4004 G. 11th St. Panama City Fl. 32405
Street City State Zip Code Phone No.

III. EMPLOYMENT:

Name, address, and phone number of employer:

Sam's Club 23rd St. 32404

How long has defendant been employed by present employer? 5 months

Income: Monthly $ 600.00 or Weekly $____

What is defendant's job? stocker

IV FINANCIAL STATUS:

1. Owner of real property: Yes____ No X

a. Description____

b. Address____

c. In whose name N/A

d. Estimated value $____

e. Total amount owed $____

Owed to: $____

$____

f. Annual income from property $____

2. Other property:

a. Automobile: Make____ Model____

In whose name registered N/A

Present value of car $____

Amount owed $____

Owed to____

FILED
95 OCT 21 AM 11:11

3

b. All other personal property of any kind

boats	$	watches	$	rifles	$
motors	$	rings	$	shotguns	$
trailers	$	pistols	$	stereos	$

Any other items:

Item	Value
	$
	$
	$
	$

c. Cash on hand $ 20.00

Cash in banks and savings & loan associations $ 0

Names and address of banks and associations:

3. Obligations:

a. Monthly rental on house or apartment $ 0

b. Mortgage payments on house (monthly) $____

To whom owed	Amount
	$
	$
	$

Total monthly payments on debts $ 200.00

4. Other information pertinent to defendant's financial status:
(Include stocks, bonds, savings bonds, interests in trusts either owned or jointly owned.)

N/A

Signed: X Tyevessel White
Defendant

Subscribed and sworn before me this
14 day of October 1993
RLS B. Barnes (CCA)

ORDER ADJUDGING DEFENDANT TO BE INSOLVENT/SOLVENT (AND APPOINTING PUBLIC DEFENDER)

POSTED
PKN

The above-named defendant now being before this Court and having made the foregoing Affidavit of Insolvency, it is therefore:

☒ ORDERED, ADJUDGED AND DECREED that the Defendant is insolvent within the meaning of the law, and that the Public Defender of the 14th Judicial Circuit is appointed to represent the Defendant as provided by law.

☐ ORDERED, ADJUDGED AND DECREED that the Defendant is not insolvent within the meaning of the law, and Defendant's request for appointment of the Public Defender is accordingly denied.

DONE AND ORDERED at Panama City, Florida, this 21st day of October A. D. 19 95

Amount of Bond

Notes:

Judge

4

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

STATE OF FLORIDA,
Plaintiff,

vs.

TYVESSEL TYVORUS WHITE,
B/M, DOB 8/3/64,
SSN 263-77-9929,
Defendant.
______________________/

INFORMATION CHARGING

POSSESSION OF A CONTROLLED SUBSTANCE (3°F)

Florida Statute 893.13
Case No. 93-2100G

FILED

William A. Lewis, Assistant State Attorney for the Fourteenth Judicial Circuit of the State of Florida, duly appointed and designated to sign Informations on behalf of Jim Appleman, State Attorney, prosecuting for said State of Florida, in the name of and by the authority of the State of Florida, in the County of Bay, under oath, informs the Court that

TYVESSEL TYVORUS WHITE, on or about the 14th day of October, 1993, in the County and State aforesaid, was unlawfully in actual or constructive possession of a controlled substance, to-wit: Cocaine, in violation of Section 893.13, Florida Statutes.

William A. Lewis, Assistant State Attorney for the Fourteenth Judicial Circuit of Florida, under oath, states that the allegations set forth in the INFORMATION are based on facts that have been sworn to as true, under oath, by material witness(es), and which, if true, would constitute the offense(s) therein charged, and that this INFORMATION is filed in good faith.

The foregoing instrument was sworn to and subscribed before me by William A. Lewis, who is personally known to me, this 14th day of February, A.D., 1994.

Teresa R. Plunge

TERESA R. PLUNGE
MY COMMISSION # CC [illegible] EXPIRES
September 17, 1997
BONDED THRU TROY FAIN INSURANCE, INC.

William A. Lewis
Assistant State Attorney
914 Harrison Avenue
Post Office Box 1040
Panama City, Florida 32402
(904) 872-4473
Florida Bar No. 339520

CIRCUIT COURT MINUTES

DATE June 10, 1994 TIME 9:02

PRESIDING JUDGE Clinton Foster

CLERK PRESENT S. Jones

COURT REPORTER PRESENT S. Lessig

FILED Jun 10 12 32 PM '94

STATE OF FLORIDA
VS
Tyvessel T. White

ATTORNEYS PRESENT
FOR STATE Bill Lewis
FOR DEFENDANT Sandra Atkin

CASE NUMBER 93-2100
CHARGE poss. of cocaine

9:02 Court called to order - court in session
9:02 Jury exit to jury room
9:04 Jury enters courtroom
9:04 Jury sworn in by clerk.
9:05 Judge gives jury preliminary instructions
9:09 Judge invokes the rule to the witnesses
9:10 State (Bill Lewis) gives opening statements
9:14 defense (Sandra Atkins) gives opening statements
9:16 State calls Randy Squire - sworn in
State direct examine Randy
9:18 Sidebar conference
9:21 State continues direct examination of Randy
9:25 defense cross examine Randy
9:30 State redirect examine Randy
9:31 defense recross examine Randy
9:32 State redirect examine Randy
9:33 Jury exit to jury room
9:33 Judge [illegible] Randy
9:3[illegible] Jury enters courtroom
9:3[illegible] State calls [illegible] - sworn in
State direct examine [illegible]

16

STATE VS. Tyvessel T White CASE NO. 93-2100

9:43 defense cross examines John
9:48 Jury exit to jury room
9:48 Δ Mtn to Suppress
9:53 Δ Mtn held for ruling
9:53 Jury enters courtroom
9:53 defense continues cross examination of John
9:55 State redirect examines John
9:55 Sidebar conference
9:56 State continues redirect examination of John
9:58 State rests
9:58 defense rests
9:58 15 minute recess - jury out
10:12 Jury in box
10:13 defense gives closing arguments
10:19 State gives closing arguments
10:36 defense gives closing arguments
10:47 Judge gives jury instructions
10:54 Jury exits to jury room to deliberate
11:15 Jury enters courtroom with verdict
11:16 Verdict: Guilty of poss of cocaine as charged-

17

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 93-2100G

TYVESSEL TYVORUS WHITE,

Defendant.

FILED
JUN 10 12 PM '94

VERDICT

WE, the Jury, find as follows as to the Defendant, TYVESSEL TYVORUS WHITE.

[Check Only One]

✓ a. The defendant is guilty of Possession of Cocaine, as charged.

___ b. The defendant is not guilty.

SO SAY WE ALL.

DATED this 10th day of June, A.D., 1994.

Cheria L. Hoyt
Foreperson

FIL.
DATE June 10 1994 TIME 11:16
HAROLD BAZZEL
CLERK OF CIRCUIT COURT
BY Jennifer Reed
DEPUTY CLERK

18

JUDGE: Clinton F... r
COURT REPORTER: S Lessig
STATE ATTY: Bill Lewis
STATE vs. Tyvessel T. White
DEFENDANT IN CUSTODY? YES (X) NO ( )

CLERK: G. ...nes
PROB. OFFICER:
DEF. ATTY: Sandra Atkins
DATE: June 10 1994

CASE # 93-2100 CHARGE: poss of cocaine
CASE # CHARGE:
CASE # CHARGE:
CASE # CHARGE:

FILED Jun 10 12 09 PM '94

P L E A

CASE # 93-2100 VOP ___ VOCC ___
TO THE CHARGE OF A/C
NOLO ___ GUILTY ___ ADM VIOL ___ PSI ___
PSR ___ SS ___ SENT SET July 20, 1994
NGRI? ___ REINS ___ REVOKED ___

updated Scoresheet

CASE # ___ VOP ___ VOCC ___
TO THE CHARGE OF ___
NOLO ___ GUILTY ___ ADM VIOL ___ PSI ___
PSR ___ SS ___ SENT SET ___
NGRI? ___ REINS ___ REVOKED ___

S E N T E N C I N G

CASE # 93-2100 ADJ W/H ___ GUILTY ✓
DOC ___ BCJA ___ CREDIT ___
COMM CONT ___ BY PROB ___ RESTIT ___
1ST ___ BCJA CC $ ___ FINE $ ___ $100 DR ___
CONC ___ W/ ___ CONSEC ___ W/ ___
HAB OFF ___ PREV COND RE-IMPOSED ___

CASE # ___ ADJ W/H ___ GUILTY ___
DOC ___ BCJA ___ CREDIT ___
COMM CONT ___ BY PROB ___ RESTIT ___
1ST ___ BCJA CC $ ___ FINE $ ___ $100 DR ___
CONC ___ W/ ___ CONSEC ___ W/ ___
HAB OFF ___ PREV COND RE-IMPOSED ___

SUBST PRG ___ B/R/B ___ A/D COUNSEL ___ PSYCH/SEX COUNSEL ___ CED/EMPLOY ___ OTHER ___
APPEAL ___ COMMENTS ___

M O T I O N S

1. Δ Mtn to suppress - held for ruling
2. Δ Mtn for directed verdict of acquittal - denied
3. ___

GRANTED ( ) ( ) ( ) DENIED ( ) ( ) ( ) CONT. ( ) ( ) ( ) HELD FOR RULING (✓) ( ) ( )
DEFENDANT CAN BE RELEASED ON THESE CHARGES? YES ___ NO ___ DEF. REMANDED YES X NO ___
DEFENDANT TO REPORT TO PROBATION & PAROLE UPON RELEASE YES ___ NO ___

WHITE - CLERK YELLOW - CCA PINK - BCSO GOLD - PROBATION & PAROLE

Guilty as charged

Judge reserves ruling on legal issues

19

A-8

Judge: FOSTER CLINTON
Court Reporter: SLESSIG BAKINS
St Att: LEWIS WILLIAM A
State vs WHITE, TYVESSEL TYVCRUS
Defendant in Custody? YES [X] NO [ ]

Clerk: PAM ME...NE
Probation Off: KEITH PATTERSON
Def Att: ATKINS SANDRA G
Date: 07/20/94

Case# 9302100CFA Chrg 1: POSSESSION OF COCAINE 0006228219 N

P L E A

CASE# 93-2100 VOP [ ] VOCC [ ]
TO THE CHARGE OF ___
NOLO [ ] GUILTY [ ] ADM VIOL [ ] PSI [ ]
PSR [ ] SS [ ] SENT SET [ ]
NGRI [ ] REINS [ ] REVOKED [ ]

CASE# ___ VOP [ ] VOCC [ ]
TO THE CHARGE OF ___
NOLO [ ] GUILTY [ ] ADM VIOL [ ] PSI [ ]
PSR [ ] SS [ ] SENT SET [ ]
NGRI [ ] REINS [ ] REVOKED [ ]

G - by jury

S E N T E N C I N G

CASE# 93-2100 ADJ W/H [ ] GUILTY [ ]
DOC ___ BCJA ___ CREDIT ___
COMM CONTROL ___ BY PROB ___ REST DIR ___
1ST ___ BCJA CC ___ FINE ___ S/C ___
$100 DRUG ___ PSI/BCAP ___ ASSOC COSTS ___
HAB OFF [ ] PREV COND REIMPOSED [ ] 1ST STEP ___
CONC [ ] W/ ___ CONSEC [ ] W/ ___

CASE# ___ ADJ W/H [ ] GUILTY [ ]
DOC ___ BCJA ___ CREDIT ___
COMM CONTROL ___ BY PROB ___ REST DIR ___
1ST ___ BCJA CC ___ FINE ___ S/C ___
$100 DRUG ___ PSI/BCAP ___ ASSOC COSTS ___
HAB OFF [ ] PREV COND REIMPOSED [ ] 1ST STEP ___
CONC [ ] W/ ___ CONSEC [ ] W/ ___

(second row of sentencing blocks, left and right, repeated blank as above)

NO PSI [ ] B/B/U [ ] A/D COUNSEL [ ] PSYCH/SEX COUNSEL [ ] GED/EMPLOY [ ] ESSAY [ ] CM TERM EARLY [ ]
STAY AWAY FROM VICTIM [ ] NO ALCOHOL [ ] DO NOT VISIT ALCOHOL PLACES [ ] BL REVOKED ___ YRS
APPEAL ___ COMMENTS ___

M O T I O N S

Motion to suppess Held under advisement

GRANTED [ ] [ ] [ ] DENIED [ ] [ ] [ ] CONT [ ] [ ] [ ] HELD UNDER ADVISEMENT [ ] [ ]

DEFENDANT CAN BE RELEASED ON THESE CHARGES Y [ ] N [ ]
DEFENDANT TO BE REMANDED ON THESE CHARGES Y [ ] N [ ]
DEF TO REPORT TO PROBATION & PAROLE UPON RELEASE Y [ ] N [ ]

FILED Jul 20 2 47 PM '94

defer Sentence til Aug 17, 1994

WHITE - CLERK YELLOW - CCA PINK - BCSO BLUE - PROBATION

21

A-9

Judge: FOSTER CLINTON
Court Reporter: SLESSIG ~~EAKINS~~
St Att: LEWIS WILLIAM A
State vs WHITE, TYVESSEL TYVORUS
Defendant in Custody? YES [✓] NO [ ]

Clerk: PAM NEWSOME
Probation Off: ~~[illegible]~~ RIVERS
Def Att: ATKINS SANDRA B
Date: 06/17/94

Case# 9302099CFA	Chrg 1: SALE OF COCAINE	0006228219	N
Case# 9302097CFA	Chrg 1: SALE OF COCAINE	0006228219	N
Case# 9302098CFA	Chrg 1: SALE OF COCAINE	0006228219	N
Case# 9302100CFA	Chrg 1: POSSESSION OF COCAINE	0006228219	N

P L E A

CASE# ________ WOP [ ] VOCC [ ] : CASE# ________ WOP [ ] VOCC [ ]
TO THE CHARGE OF ________ : TO THE CHARGE OF ________
NOLO [ ] GUILTY [ ] ADM VIOL [ ] PSI [ ] : NOLO [ ] GUILTY [ ] ADM VIOL [ ] PSI [ ]
PTR [ ] SE [ ] SENT SET [ ] : PTR [ ] SE [ ] SENT SET [ ]
NG [ ] REINS [ ] REVOKED [ ] : NG [ ] REINS [ ] REVOKED [ ]

S E N T E N C I N G

CASE# 93-2100 G by jury ADJ W/H [ ] GUILTY [ ]
DC ____ EQA ____ CREDIT ____
COMM CONTROL ____ BY PROB ____ REST DIR ____
IST ____ EQA CC ____ FINE ____ S/C ____
FCO DRUG ____ PSA/BCAP ____ ASSOC COSTS ____
HAB OFF [ ] PREV COND REIMPOSED [ ] 1ST STEP ____
CONC [ ] W/ ____ CONSEC [ ] W/ ____

pled CASE# 93-2098 ADJ W/H [ ] GUILTY [ ]
DC ____ EQA ____ CREDIT ____
COMM CONTROL ____ BY PROB ____ REST DIR ____
IST ____ EQA CC ____ FINE ____ S/C ____
FCO DRUG ____ PSA/BCAP ____ ASSOC COSTS ____
HAB OFF [ ] PREV COND REIMPOSED [ ] 1ST STEP ____
CONC [ ] W/ ____ CONSEC [ ] W/ ____

CASE# 93-2099 ADJ W/H [ ] GUILTY [ ]
DC ____ EQA ____ CREDIT ____
COMM CONTROL ____ BY PROB ____ REST DIR ____
IST ____ EQA CC ____ FINE ____ S/C ____
FCO DRUG ____ PSA/BCAP ____ ASSOC COSTS ____
HAB OFF [ ] PREV COND REIMPOSED [ ] 1ST STEP ____
CONC [ ] W/ ____ CONSEC [ ] W/ ____

pled plea CASE# 93-2097 ADJ W/H [ ] GUILTY [ ]
DC ____ EQA ____ CREDIT ____
COMM CONTROL ____ BY PROB ____ REST DIR ____
IST ____ EQA CC ____ FINE ____ S/C ____
FCO DRUG ____ PSA/BCAP ____ ASSOC COSTS ____
HAB OFF [ ] PREV COND REIMPOSED [ ] 1ST STEP ____
CONC [ ] W/ ____ CONSEC [ ] W/ ____

RUB PRS [ ] S/B/U [ ] A/D COUNSEL [ ] PSYCH/SEX COUNSEL [ ] SEC/EMPLOY [ ] ESSAY [ ] CON TERM EARLY [ ]
STY AWAY FROM VICTIM [ ] NO ALCOHOL [ ] DO NOT VISIT ALCOHOL PLACES [ ] DL REVOKED ____ YRS
APPEAL ____ COMMENTS ____

M O T I O N S

deny motion -

GRANTED [ ] [ ] [ ] DENIED [ ] [ ] [ ] CONT [ ] [ ] [ ] HELD UNDER ADVISEMENT [ ] [ ] [ ]

DEFENDANT CAN BE RELEASED ON THESE CHARGES Y [ ] N [ ]
DEFENDANT TO BE REMANDED ON THESE CHARGES Y [ ] N [ ]
DEF TO REPORT TO PROBATION & PAROLE UPON RELEASE Y [ ] N [ ]

Aug 18, 1994 @ 8:30

WHITE - CLERK YELLOW - CCA PINK - BCSO BLUE - PROBATION

22

G

____ Probation Violator
____ Community Control Violator
____ Retrial
____ Resentence

In the Circuit Court, 14th Judicial Circuit,
in and for Bay County, Florida
Division Judge Foster
Case Number 93-2100

State of Florida ** OFFICIAL RECORDS **
v. BK 1520 PG 12

TYEVESSEL TYVORUS WHITE
Defendant

FILE# 94-39465
BAY COUNTY, FLORIDA

FILED AUG 23 9 07 AM

JUDGMENT

The defendant, TYEVESSEL TYVORUS WHITE, being personally before this court represented by The Honorable Sandra Atkins, the attorney of record, and the state represented by The Honorable William A. Lewis, and having

XX been tried and found guilty by jury/by court of the following crime(s)

___ entered a plea of guilty to the following crime(s)

___ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime	Case Number	OBTS Number
I	POSSESSION OF CONTROLLED SUBSTANCE	893.13	3rd	93-2100	0006228219
	COCAINE				

XXX and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

___ and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating to sexual battery (ch. 794) or lewd and lascivious conduct (ch. 800) the defendant shall be required to submit blood specimens.

___ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

25

State of Florida
v.
TYEVESSEL TYVORUS WHITE
Defendant

Case Number 93-2100

** OFFICIAL RECORDS **
BK 1520 PG 13

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

Fingerprints taken by: M D Williams Cell Bailiff
Name Title

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, TYEVESSEL TYVORUS WHITE, and that they were placed thereon by the defendant in my presence in open court this date.

DONE AND ORDERED in open court in Panama City, Bay County, Florida, this 10th day of AUGUST, 19 94.

Clinton E. Foster
CLINTON E. FOSTER Judge

26

Defendant TYEVESSEL TYVORUS WHITE Case Number 93-2100 DOB. Number 0006228219

SENTENCE

** OFFICIAL RECORDS **
BK 1520 PG 14

(As to Count I)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, Sandra Atkins, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

___ and the Court having on _____ (date) deferred imposition of sentence until this date

___ and the Court having previously entered a judgment in this case on _____ (date) now resentences the defendant

___ and the Court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is The Sentence Of The Court that:

___ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes, plus $ _____ as the 5% surcharge required by section 960.25, Florida Statutes.

XX The defendant is hereby committed to the custody of the Department of Corrections.

___ The defendant is hereby committed to the custody of the Sheriff of _____ County, Florida.

___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

___ For a term of natural life.

XX For a term of 5 years/ .....

___ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

___ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

___ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

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Defendant TYEVESSEL TYVORI' WH..E Case Number 9" ?i

SPECIAL PROVISIONS

(As to Count I)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm ___ It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking ___ It is further ordered that the _____ mandatory minimum imprisonment provisions of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

Controlled Substance Within 1,000 Feet of School ___ It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender ___ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender ___ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

Law Enforcement Protection Act ___ It is further ordered that the defendant shall serve a minimum of ____ years before release in accordance with section 775.0823, Florida Statutes.

Capital Offense ___ It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.

Short-Barreled Rifle, Shotgun, Machine Gun ___ It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count.

Continuing Criminal Enterprise ___ It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Other Provisions:

Retention of Jurisdiction ___ The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

Jail Credit XX It is further ordered that the defendant shall be allowed a total of 307 days as credit for time incarcerated before imposition of this sentence.

Prison Credit ___ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

Other Provisions, continued:

Consecutive/Concurrent As To Other Counts ___ It is further ordered that the sentence imposed for this count shall run (check one) ___ consecutive to ___ concurrent with the sentence set forth in count _____ of this case.

Page __ of __

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Defendant TYEVESSEL TYVORI' WH..E Case Number ___ 9 :100

Consecutive/Concurrent As To Other Convictions ___ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) ___ consecutive to ___ concurrent with the following: (check one)

___ any active sentence being served.

___ specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Bay County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends _____

DONE AND ORDERED in open court at Panama City, Bay County, Florida, this 30th day of JUST AUGUST, 19 94

Clinton E. Foster

CLINTON E. FOSTER Judge

Page __ of __

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IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR THE STATE OF FLORIDA, BAY COUNTY

STATE OF FLORIDA
Plaintiff,

vs. CASE NO.: 93-2100

TYVESSEL TYVORUS WHITE
Defendant.

FILED
AUG 29 1 55 PM '94
CLERK
BAY CO.

NOTICE OF APPEAL

NOTICE IS GIVEN that TYVESSEL TYVORUS WHITE, appellant, appeals to the First District Court of Appeals in and for the State of Florida, verdict rendered by the court on June 10th, 1994; and the judgment and sentence rendered on August 18th, 1994 as well as denial of Motion to Suppress on August 17th, 1994.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to William Lewis, Assistant State Attorney, P.O. Box 1040, Panama City, FL 32402 this 29th day of August, 1994.

Sandra G. Atkins
Sandra G. Atkins
405 Oak Avenue
Panama City, FL 32401
904/763-5559
FL Bar #0602846
Attorney for Defendant

POSTED
33

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

STATE OF FLORIDA

Plaintiff/Appellee

vs. CASE NO.: 93-2100
APPEAL CASE NO.:

TYVESSEL TYVORUS WHITE

Defendant/Appellant

FILED
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BAY CO.

ORDER OF INSOLVENCY

THIS CAUSE came on before this Court upon the motion of the Defendant/Appellant for the appointment of counsel to represent him on appeal from the Order entered in this cause, and the Court having been advised in the premises, and having made inquiry of the Defendant/Appellant, and having found him so insolvent he was incapable of paying the cost, it is hereby

ORDERED AND ADJUDGED that the Defendant/Appellant is without the funds to pay the cost of this appeal, and Bay County, Florida, shall be any and all costs necessary and incident to the prosecution of this appeal for the Defendant/Appellant.

DONE AND ORDERED in chambers at Panama City, Bay County, Florida, on this 31 day of August, 1994.

CIRCUIT JUDGE

Copies to:
Sandra G. Atkins, Esq.
William Lewis, Assistant State Attorney

POSTED
36

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

STATE OF FLORIDA
Plaintiff/Appellee

vs. CASE NO.: 93-2100
APPEAL CASE NO.:
TYVESSEL TYVORUS WHITE
Defendant/Appellant.

JUDICIAL ACTS TO BE REVIEWED

Defendant/Appellant, TYVESSEL TYVORUS WHITE, by and through his undersigned attorney, states the following Judicial Acts are to be reviewed and the appeal of the verdict rendered by the court on June 10th, 1994, denial of Motion to Suppress on August 17th, 1994 and the Judgment and Sentencing entered by this court on August 18th, 1994, in the above styled cause.

1. Rulings on objections at trial. Particularly objection concerning the allowance as evidence statements of the defendant. Also, objection concerning the admission of the seized cocaine as evidence and reference to other cases (sale cases for which the trial was pending).

2. Denial of Motion for Judgment of Acquittal at the close of the States case and close of all the evidence.

3. Judges denial of Motion to Suppress the statements of the defendant and the seized cocain based on illegal search and seizure.

4. The Judge sentencing the defendant to five years Department of Corrections consecutively followed by five and one half years Department of Corrections received on violation of probation and consecutive to five years Department of Correction as habitual offender for three counts of sale of cocaine.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Honorable William Lewis, Assistant State Attorney, P.O. Box 1040, Panama City, FL 32402 this 31st day of August, 1994.

Sandra G. Atkins
SANDRA G. ATKINS
405 Oak Avenue
Panama City, FL 32401
(904)763-5559
Fla. Bar #0592848/Attorney for Defendant

FILED
AUG 31 1994
CLERK CIRCUIT COURT
BAY COUNTY FLORIDA

POSTED
41

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR THE STATE OF FLORIDA, BAY COUNTY

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 93-2100

TYVESSEL TYVORUS WHITE,

Defendant.

MOTION TO WITHDRAW

COMES NOW, Sandra G. Atkins, special appointed public defender for the Defendant, and moves this Court for an order allowing her to withdraw as Counsel of record in the above cause and would show to the Court that the undersigned attorney has filed the necessary Notice of Appeal, Statement of Judicial Acts to be Reviewed, Direction to Clerk, and Motion For Order Direction Court Reporter to Transcribe Notes. The undersigned attorney would allege that the Public Defender's office will handle the appeal and that her further representation is not necessary.

WHEREFORE, the undersigned respectfully moves this Court for an order allowing the withdrawal of Sandra G. Atkins, as attorney for the Defendant.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William Lewis, Assistant State Attorney, P.O. Box

FILED
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CLERK CIRCUIT COURT
BAY COUNTY FLORIDA

1

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PKN
55

1040, Panama City, Florida 32402 this 2nd day of September, 1994.

Sandra G. Atkins
405 Oak Avenue
Panama City, FL 32401
904/763-5559
FL Bar #0592846

ORDER ALLOWING WITHDRAWAL OF COUNSEL

THIS CAUSE came on to be heard on the Motion to Withdraw as Counsel of Record filed by Sandra G. Atkins, and allowing the Office of Public Defender, Fourteenth Judicial Circuit, to proceed as counsel of record in this cause. The Court finds that the Defendant is without the funds necessary to retain Sandra G. Atkins for her services, it is therefore,

ORDERED AND ADJUDGED that Sandra G. Atkins, is hereby permitted to withdraw as counsel of record for the Defendant, and the Office of Public Defender, Fourteenth Judicial Circuit, is hereby allowed to proceed as counsel of record in this cause.

DONE AND ORDERED in Chambers at Panama City, Bay County, Florida, on this 19 day of September, 1994.

FILED
SEP 19 1994
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

Clinton E. Foster
CLINTON E. FOSTER, CIRCUIT JUDGE

cc: S. G. Atkins, Esq.
W. Lewis, Esq.
S. Christensen

POSTED

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IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

CASE NO.: 93-2100

TYVESSEL TYVORUS WHITE,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

_____/

JURY TRIAL PROCEEDINGS

Whereupon, the following proceedings came on to be heard before the Hon. Clinton E. Foster, Circuit Court Judge, at the Bay County Courthouse, Panama City, Florida, on the 10th day of June, 1994.

APPEARANCES:

Hon. Bill Lewis, Assistant State Attorney, Fourteenth Judicial Circuit, appeared on behalf of the State of Florida.

Hon. Sandra Atkins, Attorney at Law, Fourteenth Judicial Circuit, appeared on behalf of the Defendant.

REPORTED BY:
SHERRI R. LESSIG

* * *

[Vol. II, p. 12] RANDY SQUIRE

was called as a witness, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. Tell us your name, please, sir.

A. Randy Squire.

Q. And for whom do you work?

A. Panama City Police Department.

Q. Back in October, specifically on the 14th of October of /93, what was your duty assignment at that point?

A. I was assigned as narcotics investigator with the Bay County Joint Narcotics Task Force.

Q. Okay. In that capacity did you have occasion to assist Officer Pierce in an arrest that he was going to make?

[Vol. II, p. 13] A. Yes, sir.

Q. All right. Whereabouts did you all go to affect this arrest?

A. We went to Sam's Club on 23rd Street.

Q. All right. What was your specific, I am going to call assignment in connection with the arrest?

A. Doug Pierce told me that he intended to seize Mr. White's vehicle for forfeiture and he asked me to go along to bring the vehicle back.

MRS. ATKINS: Judge, I object to the comments about arresting my client, I think that's --

THE COURT: Objection overruled.

BY MR. LEWIS:

Q. All right. When you got out there and made the arrest, where did you get the keys from to operate the car, I guess is the best way?

A. Once we got in the parking lot Officer Pierce removed the car keys from Mr. White's pocket.

Q. Now at the time you went to the vehicle what was it's status, locked, or unlocked?

A. The vehicle was locked.

Q. Now what was done with Mr. White, who dealt with him?

A. Okay, Officer Pierce put him in his undercover vehicle and drove him to the Task Force.

[Vol. II, p. 14] Q. Okay. What did you do?

A. I drove Mr. White's vehicle to the Drug Task Force Office.

Q. When you get to the Task Force Office what do you do relative to his vehicle?

A. We always do an inventory search of the vehicle.

Q. Tell the jury what an inventory search is, what the purpose of that search is?

A. The purpose of this search would be to itemize everything in the vehicle so we can return private property to the owner because we intended to keep the vehicle, itself.

Q. Okay. That protects the Police Department, if they say I had one thousand dollars and you have inventoried it there was no thousand dollars, is that part of the deal?

A. That's correct.

Q. All right. During the course of this inventory search, did you locate any contraband?

A. Yes, sir, I did.

MRS. ATKINS: I object to it being entered into evidence --

THE COURT: Come to side-bar.

(Side-bar Conference:)

[Vol. II, p. 15] THE COURT: Mr. Lewis, as I understand it, they went out to arrest him with a warrant -- did not have a search warrant, don't you have a bad search?

MR. LEWIS: No.

THE COURT: Why?

MR. LEWIS: They are seizing the automobile pursuant to --

THE COURT: Does he have an order to seize it?

MR. LEWIS: You don't have to have one, the law related to the forfeiture relates back to the time of the, the offenses.

THE COURT: If they went to his house with a search warrant to arrest him it was limited in the, if they arrested him at home and they went out there to arrest him with a search warrant limited to the house, would they have been able to search the car?

MR. LEWIS: They were seizing the vehicle pursuant to 93 207 1 through 4, the Florida Forfeiture, Vehicle, or Property Contraband, okay, or whatever they call it, the law relating to seizures of those automobiles relates back, they say the title vesting the state at the time of the offense, there need not be a determination, they have a right to seize the automobile at that point and then at that point they have an inventory search of the vehicle.

[Vol. II, p. 16] THE COURT: I will reserve ruling on her motion, I am bothered by that for this reason, suppose the charge falls when the seizure falls.

MR. LEWIS: No, no that's not true.

THE COURT: You are going to pick up somebody's property and take it regardless of anything, whether they --

MR. LEWIS: It's a different burden, civil burden in the forfeiture action, it's more than preponderance, I believe, but it's clear, convincing, I believe, but there is a different burden and seizures have been upheld even though the criminal case has result in acquitta'.

THE COURT: Supreme Court just remedied some of that.

MR. LEWIS: Well, they might have, I haven't read that case because I don't do the forfeiture stuff.

THE COURT: Okay, I will reserve ruling.

(Conference concluded.)

BY MR. LEWIS:

Q. I use the term contraband, I think that's where I was, are drugs contraband articles?

A. Yes, sir.

Q. Where did you find the contraband articles?

A. Inside the ashtray.

[Vol. II, p. 17] Q. Now how long have you been working dope?

A. In Panama City I have been about two and a half years.

Q. Else where?

A. In Illinois I worked with the Drug Task Force a year before I came here.

Q. Okay. Now what was the -- what was the condition of the ashtray?

MRS. ATKINS: Judge, I just want to say I have an objection to all this.

THE COURT: You may have an objection. Overruled.

MRS. ATKINS: Continuing objection.

BY MR. LEWIS:

Q. What was the condition of the ashtray?

A. The ashtray was empty except for the items what were seized.

Q. Let me show you what has been marked State's 1 for identification and ask you to take a look at the items contained therein and see if you recognize those items, sir.

A. Yes, sir.

Q. All right. What are they?

A. Two crack cocaine rocks.

Q. Okay. Now is that substantially the condition in [Vol. II, pg. 18] which you found them?

A. Yes, sir. They were wrapped in that paper inside that bag.

Q. Okay, looks like maybe a paper towel out of, one of those things in the bathroom?

A. Right.

Q. Okay. What did you do with those once you found them?

A. I took them inside the office and gave them to Officer Pierce.

Q. Okay. Now let me show you what has been marked State's 2 which is a Florida Vehicle Registration Certificate on a 1983 Toyota four door registered to Tyvessel T. White, is that the automobile you found these items in?

A. Yes, sir.

Q. Now in connection with your training and experience as a narcotics officer, is the use of the ashtray a common hiding place, depositing place for contraband type articles, narcotics?

A. Yes, sir.

* * *

[Vol. II, p. 20] Q. Now back to when you went to Sam's, that's [Vol. II, p. 21] where Mr. White was working, is that right?

A. That's right.

Q. Okay. And were you the one that actually placed him under arrest?

A. No. Officer Pierce did.

Q. You went to the vehicle, is that right, you were the one that went to the vehicle and Mr. Pierce was taking care of Mr. White, is that right?

A. We both went into Sam's when the arrest was made and we came out of the building together to the vehicle.

Q. Now Mr. White wasn't -- well, he was put into another vehicle, he didn't ride in his own vehicle, right, he went with Officer Pierce?

A. Right.

Q. You were in the vehicle alone?

A. Yes, sir.

Q. Driving it to the Narcotics Office or Joint Narcotics place?

A. Yes.

Q. Would that be at the Sheriff's Office, is that where you take it to?

A. No, ma'am. Task Force, separate building.

Q. Okay. And did you do any kind of a search when you first entered the vehicle there at Sam's?

[Vol. II, p. 22] A. No, I didn't.

Q. You didn't do any kind of cursory search to make sure there were no weapons in the vehicle or anything like that?

A. No.

Q. Okay. You had the keys and you indicated earlier the door was locked.

A. Yes, it was.

Q. You had to unlock it to get in. Did you check both sides of the vehicle?

A. Yes.

Q. Okay. Both doors were locked?

A. I believe it was a four door car, I believe they were all locked.

Q. And then on the way to the Narcotics Task Force you didn't notice anything in the car at that time, you didn't notice anything in the ashtray at that time?

A. No, I didn't.

Q. Okay. And when you did this, you told the prosecutor a little bit about how you inventory it, but was there anyone else present when you searched the vehicle?

A. No, ma'am.

Q. Okay. Officer Pierce was not present at that [Vol. II, p. 23] time?

A. No, he wasn't.

Q. And you search it and write down what you find, is that the way it goes?

A. No.

Q. How?

A. The initial search is strictly for contraband and weapons like you suggested, and before we make an itemized list of everything in the vehicle we like to give the owner of the vehicle an opportunity to get their property back to save the paperwork.

Q. Okay. So before you make an itemized list, but you do look at everything to make sure that it's things that there is no problem in giving back to someone, is that right?

A. That's correct.

Q. Okay. So how long did it take you to do this search?

A. I don't know; probably at least half an hour.

Q. So it was a pretty thorough search?

A. Yes.

Q. Did you find this contraband immediately almost upon searching the vehicle?

A. Yes, I did.

Q. And what did you do with it when you found it?

[Vol. II, p. 24] A. I took it inside the Task Force Office and gave it to Officer Pierce.

Q. Okay. Did you di any sort of test or anything on it at that point?

A. Officer Pierce did.

Q. Okay. Does it ever become a practice for you to ever have more than one person searching a vehicle, more than one officer?

A. There isn't really a common practice for that, just depends on how many people are available at the time.

Q. Okay.

MRS. ATKINS: You may inquire.

REDIRECT EXAMINATION

BY MR. LEWIS:

Q. You said it took about half an hour to search, it didn't take you half an hour to find this dope?

A. No, sir.

Q. After you found it you either turned it over at that point or SOME other time AND the you continued to search the REST of the vehicle?

A. That's right.

* * *

[Vol. II, p. 26] THE COURT: And do you know whether or not any type of forfeiture proceeding has been initiated against the automobile?

THE WITNESS: I believe that forfeiture has been finished, I think --

THE COURT: Do you know what basis existed at the time you made the arrest and searched the car to file a forfeiture proceeding, what information did you have that that vehicle had been used in illegal activity?

THE WITNESS: There were all Doug Pierce's cases, it's my understanding this vehicle had been used to deliver and sell cocaine on at least two occasions, maybe three.

MR. LEWIS: And you had been present at least at one of those sales?

THE WITNESS: Yes.

[Vol. II, p. 28] THE COURT: A sale from the car?

THE WITNESS: Yes.

MR. LEWIS: Judge, if you remember at the VOP hearing these are the ones where the videotape shows him drive up in the vehicle at a Jr. Food Store, he gets out of the vehicle, then one sale, he actually hands it out of the window to the vehicle, the next vehicle, so they are all documented by the video tapes.

MRS. ATKINS: Judge, I still have a problem about them going to the place where my client works and arresting him then seizing his vehicle, searching it and --

THE COURT: Well, I have some problems with it, too, but it may be legal. I have some problems with the seizure, they knew where he was, went out and got a warrant to go arrest him, I don't know why they couldn't get a search warrant. My concern is whether or not that was merely a charade to search the vehicle.

MR. LEWIS: You don't need a search warrant to search your own properly. The law is, like I said, it's been a long time since I did forfeiture work but the law says that title vests in the investigating agency at the time of the offense which was preceding this so it was their car --

THE COURT: I think the appellate courts have [Vol. II, p. 29] a different version of that as you related strictly to forfeiture you may be correct but when you transpose that to search and seizures I am afraid you might come up with different results. I am concerned about the procedure, that's the reason I reserved jurisdiction, to rule on it later but it appears to me to be an unusual way of doing it. Maybe you do it all the time, just not --

MR. LEWIS: I think it's done all the time.

THE COURT: The question has not been raised on it before.

MRS. ATKINS: My understanding is that when you have sufficient time to get a search warrant that's the way it's supposed to go, they know they want to search something --

THE COURT: My concern is that you can go in under a quasi civil procedure that only requires the burden of proof that is applicable in civil cases to bring in evidence in a criminal case where the burden is beyond and to the exclusion of a reasonable doubt and it would not be otherwise admissible. That's my concern about it. Seems like you're doing by a securius route what you cannot do directly, it may be permissible. You may bring the jury out. You may step down.

MR. LEWIS: If you would, send Officer Pierce [Vol. II, p. 30] in, please.

WHEREUPON,

JOHN PIERCE

was called as a witness, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. Tell us your name, please, sir.

A. John Douglas Pierce.

Q. Mr. Pierce, back on October 14 what was your duty assignments?

A. Assigned to the Bay County Joint Narcotics Task Force.

Q. Okay. What's your present duty assignment?

A. Assigned narcotics, Panama City Police.

Q. All right. Back on the 14th did you have an occasion to arrest the Defendant?

A. Yes, sir.

Q. Anybody go with you?

A. Yes, sir.

Q. Who was that?

A. Corporal Squire.

Q. All right. You all arrested him at Sam's?

A. Yes, sir.

Q. All right. What was Officer Squire's [Vol. II, p. 31] assignment?

A. To assist in the arrest, if we had any problems -- it's easier with two people, one person -- I am not saying he would but other people would want to fight one person; two people they don't want to fight.

Q. After the arrest was Office Squire charged with the responsibility of driving the Defendant's vehicle back to the Task Force Office?

A. Yes, sir.

Q. All right. Sometime after you all got there did Office Squire bring you some contraband articles that he located in the vehicle?

A. Yes, sir.

Q. Let me show you what has been marked as State's 1 for identification, ask you to take a look at it and see if you recognize it?

A. Yes, sir.

Q. How do you recognize that?

A. It's got my writing on it, my initials on the back.

Q. All right. Now when you get evidence, specifically narcotics type evidence, what do you do with it to send it to the lab?

A. I package it in a plastic container like this, cocaine I do, package it in a container like this and [Vol. II, p. 31] then turn it into our evidence technician.

Q. Do you seal it up, seal that container up?

A. Yes, sir.

Q. Until you opened that envelope at my office this morning has it been in a sealed condition since you received it back from the lab?

A. Yes, sir.

Q. Does it appear to be in the same or substantially the same condition when you received it from Officer Squire?

A. Yes, sir. Except it's got an "X" right there.

Q. Okay.

MR. LEWIS: At this time I would offer into evidence State's 1.

MRS. ATKINS: Some objection.

THE COURT: Same ruling.

BY MR. LEWIS:

Q. Let me show you what been marked State's 2 for identification, Florida Vehicle Registration Certificate on a 1983 Toyota four-door registered to Tyvessel T. White, is that the vehicle that was seized at the time of his arrest?

A. Yes, sir.

Q. Is this the vehicle Mr. Squire drove to the Task Force Office?

[Vol. II, p. 33] A. Yes, sir.

MR. LEWIS: At this time I would offer into evidence State's 2.

MRS. ATKINS: Same objection.

THE COURT: Admitted subject to prior ruling.

* * *

[Vol. II, p. 34] Q. The man that made that remark, that you arrested at Sam's -- well let me ask you this, one other question before we get that far. After you arrested him, did you, where did you get the keys to operate the [Vol. II, p. 35] vehicle?

A. Out of his pocket.

Q. All right. Those are the keys you gave to Corporal Squire?

A. Yes, sir.

* * *

[Vol. II, p. 41] THE COURT: I am going to let the matter go, I have reserved jurisdiction on your Motion to Suppress.

* * *

BY MRS. ATKINS:

[Vol. II, p. 44] Q. Officer Pierce, now you weren't the one that actually searched the vehicle?

A. No.

Q. Corporal Squires did that?

A. Yes, ma'am.

Q. There was no search conducted that the actual cite when it was picked up at Sam's?

A. No, ma'am.

Q. Okay. Did you ever get in the vehicle at all?

A. When I recovered the registration slip.

Q. Okay. When was that?

A. Afterwards, I had to do inventory on the stuff [Vol. II, p. 45] inside the vehicle.

Q. So that was down at the Task Force?

A. Task Force, yes, ma'am.

Q. Okay. So you're the one that actually did the inventory rather than Corporal Squire?

A. He might have done part, I don't know.

Q. Okay. But Mr. White was not able to actually be present when the car was searched, is that right?

A. No, ma'am.

Q. He was inside I guess with you, and Officer Squires was searching the vehicle, is that right?

A. Yes, ma'am.

Q. And you were the one that Corporal Squires gives the contraband to, is that right?

A. Yes, ma'am.

Q. What did you do with it?

A. Field tested it, then packaged it up for evidence.

Q. Okay. Then later on is when you retrieved the registration?

A. Yes, ma'am.

* * *

[Vol. II, p. 76] THE COURT: Let the record reflect the Defendant moved for a directed verdict of acquittal at the close of all the evidence and it was denied, renewed at the close of the State's case and denied and renewed at close of all of the evidence.

* * *

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

TYVESSEL TYVORUS WHITE,

Defendant/Appellant, DCA CASE NO:

vs. CASE NO: 93-2100

STATE OF FLORIDA,

Plaintiff/Appellee.

* * *

The following pages constitute the Sentencing on the 17th day of August, 1994, in the above-styled cause, heard before the Honorable Clinton E. Foster, Circuit Judge, at the Bay County Courthouse, Panama City, Florida. Taken before Rebecca Ann Akins, a Notary Public and Official Court Reporter in and for the State of Florida at Large.

* * *

REBECCA ANN AKINS
OFFICIAL COURT REPORTER
POST OFFICE BOX 573
PANAMA CITY, FLORIDA 32402-0573

* * *

[Vol. III, p. 83] AUGUST 17, 1994

THE COURT: Is your, is your client here?

MRS. ATKINS: Yes, he's here, Judge.

THE COURT: What's his name?

MRS. ATKINS: Tyvessel White.

THE COURT: White, okay.

MRS. ATKINS Judge, we're, we're here on sentencing for Mr. White. However, we did have that issue about the --

THE COURT: Okay, I, I am going to --

MRS. ATKINS: Okay. I have my memorandum, Judge, but I really didn't find a whole lot. I'll, I'll go ahead and give it to you, but I couldn't find any real specific --

THE COURT: I, I would, I would encourage you -- I'm going to deny your motion but I'm going to encourage you to appeal that --

MRS. ATKINS: Yes, sir.

THE COURT: -- that issue. As a matter of fact, I invite you to --

MRS. ATKINS: Yes, sir.

THE COURT: -- appeal it because as I understand the, the, the way the thing came down . . .

MRS. ATKINS: Yes, sir.

THE COURT: . . . is that at some earlier time [Vol. III, p. 83] this defendant had been observed trafficking in cocaine or selling cocaine or buying cocaine.

MR. LEWIS: Yes, sir.

MRS. ATKINS: Selling cocaine was what they were --

THE COURT: Right. And at some later time they secured an arrest warrant and went out to arrest him.

MR. LEWIS: They actually arrested him on the signed complaint, Your Honor. They didn't even have a --

THE COURT: A signed complaint.

MR. LEWIS: Yes, sir.

THE COURT: At some later time.

MR. LEWIS: Right.

MRS. ATKINS: Yeah.

THE COURT: At this later time, when they went out to arrest him, they, after the arrest, seized the, his automobile under the forfeiture statute.

MR. LEWIS: Let me at this point interrupt the Court. I'm going, I'm going to say it's simultaneous with the arrest.

THE COURT: Simultaneous with, with the arrest.

MR. LEWIS: Yes, sir. Yes, sir.

[Vol. III, p. 84] THE COURT: And in this intervening time they made no effort to, to secure a forfeiture order or implement formal forfeiture proceedings.

MRS. ATKINS: Correct.

MR. LEWIS: At the time of the seizure they had not done that.

THE COURT: Had not done that.

MRS. ATKINS: Correct, yes.

MR. LEWIS: Correct.

THE COURT: And in my mind the, the constitutional protection against unreasonable searches and seizures were, was effectively circumvented. I can't find any law to support that.

MRS. ATKINS: Yes, sir.

MR. LEWIS: And I think the law is to the contrary, that I've provided to the Court.

THE COURT: And that's, that's the only reason that I'm not granting your motion.

MRS. ATKINS: Yes, sir.

THE COURT: And I invite you to appeal that.

MRS. ATKINS: Yes, sir. I, I could not find anything specific on that either, Judge.

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

Tyvessel Tyvorus WHITE, Appellant,
v.
STATE of Florida, Appellee.

No. 94-2823.

July 29, 1996.

Defendant was convicted in the Circuit Court, Bay County, Clinton Foster, J., of possession of cocaine, which was found during inventory search of his automobile following its warrantless seizure pursuant to Florida Contraband Forfeiture Act. Defendant appealed. On motion for certification, the District Court of Appeal, Van Nortwick, J., held that: (1) Act authorized warrantless seizure of vehicle based on probable cause to believe that defendant had previously used vehicle to facilitate sale of cocaine; (2) Act did not violate Fourth Amendment; and (3) defendant's pre-*Miranda* statement was involuntary.

Affirmed.

Wolf, J., issued concurring and dissenting opinion.

Nancy A. Daniels, Public Defender; David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

VAN NORTWICK, Judge.

We grant appellant's motion for certification, withdraw our prior opinion in this cause, substitute the following opinion in its stead, and certify a question of great public importance to the Florida Supreme Court.

Tyvessel Tyvorus White appeals his judgment and sentence for possession of cocaine. White argues that the trial court erred in denying his motion to suppress the introduction into evidence of cocaine found in White's car during a warrantless inventory search of the car following its seizure pursuant to the Florida Contraband Forfeiture Act, sections 932.701--932.707, Florida Statutes (1993), and in failing to exclude the testimony of a police officer relating to a prejudicial statement made by White prior to receiving "*Miranda* warnings." (FN1) Because we conclude (i) that the police had probable cause to seize White's vehicle under the Forfeiture Act and the subsequent inventory search of the seized car was a reasonable procedural measure and (ii) that White's statement was freely and voluntarily given without interrogation or its functional equivalent, we affirm.

Factual and Procedural Background

In October 1993, White was arrested at his place of employment by police officers with the Bay County Joint Narcotics Task Force and charged with the sale of a controlled substance. (FN2) Prior to his arrest, the arresting police officers had determined to seize White's automobile under the Forfeiture Act on the grounds that, based on police eye-witnesses and videotape, it had been used in the delivery and sale of cocaine. As contemplated by the Forfeiture Act, section 932.703, Florida Statutes (1993), no prior court order or warrant was issued authorizing the seizure. The car was seized and removed to the task force headquarters, where a routine inventory search revealed

two pieces of crack cocaine in the ashtray. Based on the seizure of this crack cocaine, White was also charged with possession of a controlled substance, his conviction for which is the subject of the instant appeal.

White was also transported to the task force headquarters. Prior to the arresting officer reading White his constitutional warnings, and during the course of the officer explaining to White the charges for which he was arrested, White remarked that "He had recently got back into the business." Because of prior discussions between the arresting officer and White, the officer understood the "business" to mean the sale of cocaine.

White moved to suppress the cocaine seized during the search of his car and, at trial, objected to the introduction of his statements made prior to receiving the *Miranda* warnings. The trial court reserved ruling on these issues and allowed the evidence and statements to go to the jury. White was found guilty as charged. At a subsequent hearing, White's suppression motion was denied.

Forfeiture Seizure and Subsequent Search

On appeal, White argues that the trial court should have suppressed the cocaine seized from his car. He contends that the seizure of his vehicle was impermissible since it was made without warrant or probable cause and the subsequent search was unreasonable under the Fourth Amendment since the forfeiture seizure was improper and the police had no probable cause to search the vehicle.

The Florida Contraband Forfeiture Act authorizes law enforcement agencies to seize vehicles "of any kind" used "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." s 932.701(2)(a)5; 932.702(3), Fla. Stat. (1993). The Forfeiture Act defines "contraband article"

to include "any controlled substance as defined in chapter 893." s 932.701(2)(a)1, Fla. Stat. (1993). Chapter 893 includes cocaine and its derivatives in its list of controlled substances. s 893.03(2)(a)4, Fla. Stat. (1993). Thus, the Forfeiture Act clearly authorizes the police to seize vehicles used to facilitate the sale of cocaine.

The Forfeiture Act sets forth the procedure to be used in seizing personal property, as follows:

> Personal property may be seized at the time of the violation or subsequent to the violation, provided that the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to a(sic) adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act.

s 932.703(2)(a), Fla. Stat. (1993). A post-seizure adversarial preliminary hearing may be requested within 15 days after receipt of this notice and the hearing must be set and noticed by the seizing agency and held by the court within 10 days of receipt of the hearing request or as soon as practicable thereafter. *Id.* At the hearing, the court must determine whether probable cause existed for the seizure. s 932.703(2)(a), Fla. Stat. (1993). Thus, the only pre-seizure procedural requirement under the Forfeiture Act is the giving of a notice of the right to a subsequent hearing. Here, White does not claim this notice requirement was violated.

White's argument that to seize his car under the Forfeiture Act the police were required to have probable cause to believe the vehicle contained contraband at the time of seizure is without merit. Under the Forfeiture Act, the seizing agency is required only to have probable cause to believe that the property sought to be seized "was used, is being used, was attempted to be used, or was intended to be used" in violation of the Forfeiture Act. s

932.703(2)(c), Fla. Stat. (1993). The fact that the police, as here, did not have probable cause to believe the vehicle contained contraband or was being used in violation of the Forfeiture Act at the moment they seized the vehicle does not render the seizure unlawful under the Act. Having probable cause to believe there was prior usage of the vehicle in violation of the Forfeiture Act is sufficient. (FN3) *See, Knight v. State,* 336 So.2d 385, 387 (Fla. 1st DCA 1976), *cert. denied,* 345 So.2d 424 (Fla.1977)(Forfeiture Act "clearly contemplates that proof of past violations of the act may provide the basis for forfeiture."); *State v. One (1) 1977 Volkswagen,* 455 So.2d 434 (Fla. 1st DCA 1984), *approved,* 478 So.2d 347 (Fla.1985)(police properly seized a vehicle based upon a drug transaction occurring almost two months prior to the seizure); *In re Forfeiture of 1979 Toyota Corolla,* 424 So.2d 922, 924 (Fla. 4th DCA 1982)("[T]ransportation by automobile of a key figure to the site of a drug transaction constitutes a sufficient nexus to justify the forfeiture of the car.").

Similarly, White's argument that the police were required to obtain a warrant or court order before seizing the vehicle is without merit. Nothing in the Forfeiture Act requires the obtaining of a warrant or court order before seizing a vehicle. *See, State v. Pomerance,* 434 So.2d 329, 330 (Fla. 2d DCA 1983)(The Forfeiture Act "nowhere mentions obtaining a warrant; it simply states that an offending vehicle 'shall be seized.' We know of no rationale for judicially engrafting onto the statute a requirement that a warrant be obtained."); *In re Forfeiture of 1986 Ford PU,* 619 So.2d 337, 338 (Fla. 2d DCA 1993)(Forfeiture Act does not require a warrant, consent, or exigent circumstances prior to seizing a vehicle used in violation of the statute).

The fact that the Florida Legislature has authorized by statute the warrantless seizure of a vehicle based upon probable cause that it had been used to facilitate a drug transaction, however, does not end our inquiry. The further question raised here is whether such a warrantless seizure of a motor vehicle violates constitutional

prohibitions against illegal search and seizure. (FN4) We hold that it does not.

Neither the Florida nor United States Supreme Court has directly addressed whether the Fourth Amendment requires law enforcement officers to obtain a warrant prior to seizing a vehicle under the Florida Forfeiture Act or similar statute. The Florida Forfeiture Act, however, is substantively similar to the federal forfeiture statute, *see,* 21 U.S.C. s 881, and the Uniform Controlled Substances Act, *see,* 9 U.L.A. s 505. Thus, decisions of federal courts and courts of certain sister states are useful to our consideration here.

The federal circuits are split in their analysis of this issue. The majority of the circuits that have considered this question have held that a warrantless seizure of a vehicle under the federal forfeiture act does not violate the Fourth Amendment and that evidence obtained in a subsequent inventory search is admissible in a criminal prosecution. *U.S. v. Decker,* 19 F.3d 287 (6th Cir.1994); *U.S. v. Pace,* 898 F.2d 1218 (7th Cir.1990); *U.S. v. Valdes,* 876 F.2d 1554 (11th Cir.1989); *U.S. v. One 1978 Mercedes Benz, Four-Door Sedan,* 711 F.2d 1297 (5th Cir.1983); *U.S. v. Kemp,* 690 F.2d 397 (4th Cir.1982); *U.S. v. Bush,* 647 F.2d 357 (3d Cir.1981). Only three circuits have held the procedure in question to have been a violation of a defendant's Fourth Amendment rights. *See, U.S. v. Dixon,* 1 F.3d 1080 (10th Cir.1993); *U.S. v. Lasanta,* 978 F.2d 1300 (2d Cir.1992); *U.S. v. $149,442.43 in U.S. Currency,* 965 F.2d 868 (10th Cir.1992); *U.S. v. Linn,* 880 F.2d 209 (9th Cir.1989). (FN5) We have examined these federal decisions and find the rationale employed by the majority view to be persuasive.

Several state appellate courts have also addressed this issue. For example, in *State v. McFadden,* 63 Wash.App. 441, 820 P.2d 53, 57 (Wash.App.1991), *rev. denied,* 119 Wash.2d 1002, 832 P.2d 487 (Wash.1992), the Washington court held:

> We hold that a motor vehicle seized pursuant to [Washington forfeiture statute] on probable cause that it is used to facilitate a drug transaction is subject to a valid inventory search and evidence found in the course of such a search is admissible at trial.

See also, Lowery v. Nelson, 43 Wash.App. 741, 719 P.2d 594 (Wash.App.1986), *rev. denied,* 106 Wash.2d 1013 (1986); *State v. Brickhouse,* 20 Kan.App.2d 495, 890 P.2d 353 (1995); *c.f., Davis v. State,* 813 P.2d 1178 (Utah 1991).

We join the majority of the federal and state jurisdictions which have considered this issue and hold that a warrantless seizure of a motor vehicle based on probable cause that the vehicle was used in violation of the Forfeiture Act does not violate the Fourth Amendment prohibition against unreasonable searches and seizure. Although the decisions upholding a warrantless forfeiture seizure state various reasons, we prefer the rationale adopted by the Eleventh Circuit in *U.S. v. Valdes,* 876 F.2d at 1559-60. In *Valdes,* in upholding under the Fourth Amendment a seizure and subsequent inventory search of an automobile under the federal forfeiture statute, the court reasoned and held:

> If federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs. Appellants would have us accord the trafficker's property interest greater deference than his liberty interest; they seem to suggest that the injury caused by erroneous detention (i.e. the period of time between seizure, or arrest, and the magistrate's ruling ending the detention) is somehow greater in the case of one's property than it is in the case of one's liberty. We are not persuaded. We therefore hold that the warrantless seizures of appellants' automobiles, and the subsequent inventory

> searches, were not unreasonable under the fourth amendment. (Footnotes omitted).

Id.

We are also influenced in our holding by the fact that the property seized here was a motor vehicle, a type of property found by the Supreme Court to have less Fourth Amendment protection against warrantless searches and seizures under the so-called "automobile exception," *California v. Carney,* 471 U.S. 386, 390, 105 S.Ct. 2066, 2068, 85 L.Ed.2d 406 (1985). Although privacy interests in a motor vehicle are protected under the Fourth Amendment, under the automobile exception those interests have a lesser degree of protection because "the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought," *id.,* 471 U.S. at 390, 105 S.Ct. at 2069, and "because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id.,* 471 U.S. at 391, 105 S.Ct. at 2069. Thus, a warrantless search and seizure of a motor vehicle may pass constitutional scrutiny absent any exigent circumstances other than the characteristics inherent in a motor vehicle. *Id.* 471 U.S. at 390-91, 105 S. Ct. at 2069. Logically, for the same reasons, a motor vehicle may be seized under a forfeiture statute without a prior warrant. *See e.g., U.S. v. Linn,* 880 F.2d at 215; *U.S. v. $29,000--U.S. Currency,* 745 F.2d 853 (4th Cir.1984).

Because we hold that the police properly seized the appellant's vehicle under the Forfeiture Act, we conclude that the subsequent inventory search was reasonable and, thus, the cocaine seized in the vehicle was properly admitted at trial. *Cooper v. State of California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)(inventory searches pursuant to standard police procedures are reasonable under Fourth Amendment); *U.S. v. Valdes,* 876 F.2d at 1559-60; *State v. Pomerance,* 434 So.2d 329, 330 (Fla. 2d DCA 1983)(if the defendant's automobile was

properly seized under the Forfeiture Act "the search of the trunk of the car was a proper inventory search"). We find *Cooper* directly applicable here. In *Cooper,* the Supreme Court upheld the warrantless search of a vehicle justified solely on the basis that the vehicle was in the lawful custody of the state following its seizure under California's forfeiture statute, ruling:

> It would be unreasonable to hold that the police, having to retain the car in their custody ... had no right, even for their own protection, to search it. It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz,* 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

Cooper, 386 U.S. at 61-62, 87 S.Ct. at 791.

Nevertheless, because we recognize that neither the Florida Supreme Court nor United States Supreme Court has directly addressed the issue presented here, and that the federal circuit courts have reached different conclusions concerning this constitutional issue, we certify to the Florida Supreme Court the following question as one of great public importance:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.

Statement Prior to Miranda Warning

White argues that his statement to the police that "[h]e had recently got back into the business" was made while he was in custody during the "functional equivalent" of interrogation and, therefore, violated the requirements of *Miranda.* We find, however, that competent substantial evidence in the record supports a conclusion that the statement was spontaneously, freely, and voluntarily made and, accordingly, the trial court did not abuse its discretion in admitting the statement into evidence. *Gray v. State,* 640 So.2d 186, 194 (Fla. 1st DCA 1994).

Miranda established that "[p]rior to any questioning, the [suspect] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444, 86 S.Ct. at 1612. *Miranda* states, however, that "[a]ny statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." 384 U.S. at 478, 86 S.Ct. at 1630. Nevertheless,

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean
>
> > questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

384 U.S. at 444, 86 S.Ct. at 1612. Thus, "[t]he fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of

warnings and counsel, but whether he can be interrogated...." 384 U.S. at 478, 86 S.Ct. at 1630.

In *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Court concluded "that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.*, 446 U.S. at 300-301, 100 S.Ct. at 1689. The *Innis* court further concluded that the functional equivalent of interrogation under *Miranda* refers to practices that the police "should know" are "reasonably likely to elicit an incriminating response from the suspect." *Id.*, 446 U.S. at 301, 100 S.Ct. at 1689-1690. This interrogation standard is an objective one which "focuses primarily upon perceptions of the suspect, rather than the intent of the police." *Id.*, 446 U.S. at 301, 100 S.Ct. at 1690.

In the instant case, while the arresting officer was reading the arrest affidavits to White, explaining the charges for which he was arrested, White made the incriminating statement. Although at the time the statement was made, White had not been read his *Miranda* rights, his statement did not come in response to any question posed by the police. Thus, to conclude whether White's statement was properly admissible, it must be determined whether the statement was made voluntarily or through the functional equivalent of interrogation.

The Supreme Court in *Innis* "address[ed] for the first time the meaning of 'interrogation' under *Miranda* ...," *id.* 446 U.S. at 297, 100 S.Ct. at 1687-88, and discussed the two-prong analysis used in determining whether a suspect's statements are freely and voluntarily given or are the result of interrogation or its functional equivalent. In *Innis,* the defendant was arrested for murder, kidnapping and armed robbery, during which he had used a shotgun. *Innis,* 446 U.S. at 294, 100 S.Ct. at 1686. At the time of his arrest he was unarmed. *Id.* After being given his *Miranda* rights and stating that he wanted to speak with a lawyer he was placed in the back of a police car. *Id.* During the ride to the

police station the two arresting officers in the patrol car began a conversation about the missing shotgun, mentioning their concerns that one of the handicapped children from a nearby school might find the gun and injure themselves. *Id.*, 446 U.S. at 294-95, 100 S.Ct. at 1686-87. The defendant interrupted the conversation and stated that he would show the police were the gun was located. *Id.*, 446 U.S. at 295, 100 S.Ct. at 1687. The Supreme Court concluded that at the time the statement was made the defendant was not being interrogated within the meaning of *Miranda. Id.*, 446 U.S. at 302, 100 S.Ct. at 1690. The Supreme Court reasoned as follows:

> It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between [the] Patrolmen ... included no express questioning of the respondent....
>
> Moreover, it cannot be fairly concluded that the respondent was subject to the "functional equivalent" of questioning. It cannot be said, in short, that [the] Patrolmen ... should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent.

Id. The Court went on to explain that, while the officer's comments obviously "struck a responsive chord" in the defendant, the conversation did not amount to the functional equivalent of interrogation. *Id.*, 446 U.S. at 303, 100 S.Ct. at 1691. The Court reasoned that there was

> nothing in the record to suggest that the officers were aware that the respondent was *peculiarly susceptible* to an appeal to his conscience concerning the safety of handicapped children. Nor [was] there anything in the record to suggest that the police knew that the respondent was *unusually disoriented or upset* at the time of his arrest.

Id., 446 U.S. at 302-303, 100 S.Ct. at 1690. (Emphasis added). Therefore, the Court found that the record failed to show that the police "should have known" the conversation they had "was reasonably likely to elicit an incriminating response" from the defendant, *id.*, 446 U.S. at 303, 100 S.Ct. at 1691, and held the statement was properly admitted into evidence.

Similarly, in the instant case, it is undisputed that White's statement was not made in response to express questioning. Further, it cannot be fairly concluded that White was subject to the "functional equivalent" of questioning. The arresting officer's act of explaining the charges to White was reasonable and understandable given that White had just been placed under arrest and had asked to know why. Like in *Innis*, the fact that the officer's explanation may have "struck a responsive chord," causing White to interject that "[h]e recently got back into the business," does not constitute the functional equivalent of an interrogation. Nothing in the record indicates to us that the arresting officers should have known that the explanation of charges to White was reasonably likely to elicit an incriminating response. Further, nothing in the record shows that the officers were aware that White was "peculiarly susceptible" or so "unusually disoriented or upset" that simply informing him of the charges would likely evoke incriminating statements. Because we find that White's statement was made freely and voluntarily, and not in response to express questioning or during the functional equivalent of an interrogation, we hold that the statement was properly admissible at trial under *Miranda*. *See also, Hawkins v. State*, 217 So.2d 582, 583 (Fla. 4th DCA 1969).

AFFIRMED.

WEBSTER, J., concurs.

WOLF, J., concurs and dissents with written opinion.

WOLF, Judge, concurring in part and dissenting in part.

I concur in the majority's decision to certify a question to the Florida Supreme Court, but respectfully dissent from their decision to uphold the warrantless seizure of the automobile.

The warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as a result of prior narcotics transactions.

Appellant was arrested at his workplace based upon narcotics transactions unrelated to his present conviction. Officer Pierce was the arresting officer, and he was accompanied by Officer Squire. The purpose of Squire's presence at the arrest was to drive appellant's vehicle which was to be seized for forfeiture because it had been used to sell and deliver cocaine. There was no warrant authorizing seizure of the vehicle.

At the time of appellant's arrest, he had the car keys in his pocket and the vehicle was parked outside in the parking lot of his place of employment. The police seized and searched the vehicle. The subsequent search of the vehicle revealed two pieces of crack cocaine in the ashtray of the car. It is this cocaine which is the subject of the charges in the instant case.

The Fourth Amendment requires that police obtain a warrant for search and seizure of an automobile absent exigent circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). While exigent circumstances may justify a warrantless seizure, no such circumstances exist in this case. The state argues, however, that the warrantless seizure is justified based on the fact that probable cause existed to believe that the car was subject to forfeiture. There is no Florida case that directly deals with this issue. In *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla.1991), the court found that notification was not constitutionally mandated prior to a seizure pursuant to the Florida Contraband Forfeiture Act, sections

932.701-932.704, Florida Statutes (1993). The court did not rule directly on whether a warrant was required, but stated,

> The state conceded at oral argument that the fourth amendment applies to the seizure
>
> > of property in forfeiture actions, and argued that the fourth amendment protections adequately protect property owners. We fully agree that the fourth amendment applies when there has been a seizure.

Department of Law Enforcement, supra at 963. The court further states in a footnote,

> Since article I, section 12 of the Florida Constitution expressly requires conformity with the fourth amendment of the United States Constitution, *the warrant requirement of article I, section 12 also applies to forfeiture actions under Florida law.*

Id. at 963 (emphasis added).

The decision of the second district in *In re: Forfeiture of 1986 Ford PU,* 619 So.2d 337 (Fla. 2d DCA 1993), is not inconsistent with the supreme court's statement concerning the applicability of the Fourth Amendment's warrant requirement. The court ruled that nothing in the case of *Department of Law Enforcement, supra,* or the forfeiture statute specifically requires a warrant, but the court did not specifically rule on whether a warrantless seizure would violate the Fourth Amendment. To the extent that the decision could be argued to support the argument that no warrant is required, it is unpersuasive because no analysis is presented to support this position.

Federal courts which have dealt with the necessity of obtaining a warrant when property is subject to a federal forfeiture statute have reached different conclusions. The ninth circuit has

held that a warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment, (FN6) notwithstanding probable cause to believe that the car is subject to forfeiture. *UNITED STATES V. MCCORMICK,* 502 F.2D 281 (9TH CIR. 1974); *UNITED STATES V. SPETZ,* 721 F.2D 1457 (9TH CIR.1983). IN *U.S. V. LASANTA,* 978 F.2D 1300 (2ND CIR.1992)(FN7), the court discussed the cases which had upheld the warrantless seizures of automobiles subject to forfeiture and stated,

> We find no language in the fourth amendment suggesting that the right of the people to be secure in their "persons, houses, papers, and effects" applies to all searches and seizures except civil-forfeiture seizures in drug cases.

Id. at 1305. In rejecting the attorney general's argument, the court goes on to state,

> While congress may have intended civil forfeiture to be a "powerful weapon in the war on drugs," it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the constitution itself a casualty.

Id. at 1305 (citations omitted).

In *United States v. Valdes,* 876 F.2d 1554 (11th Cir.1989), the 11th circuit, however, justified a warrantless seizure of property subject to forfeiture on the basis that a warrantless arrest of a person may be made based on probable cause, and a person's property is entitled to no greater protection than the person himself. *See also U.S. v. Pace,* 898 F.2d 1218 (7th Cir.1990). Such warrantless seizures have also been upheld based on the lack of reasonable expectation of privacy attached to a car on a public street. *See Pace, supra* at 1242; *U.S. v. Bush,* 647 F.2d 357 (3rd Cir.1981). This line of reasoning is based on a statement in the Supreme Court's opinion in *G.M. Leasing Corp. v. United States,*

429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), where a warrantless seizure of an automobile by internal revenue agents to satisfy a tax levy was upheld. (FN8) Other cases seem to adopt the reasoning that once you have probable cause to seize a vehicle, or believe it is used for drugs, then exigent circumstances continue to exist even if the seizure is not made until several months later. *U.S. v. One Mercedes Benz, Four-Door Sedan,* 711 F.2d 1297 (5th Cir.1983); *U.S. v. Kemp,* 690 F.2d 397 (4th Cir.1982).

These cases validating a warrantless search absent exigent circumstances are unpersuasive. The argument concerning no reasonable expectation of privacy concerning your vehicle on a public street fails to recognize the factual situation in *G.M. Leasing Corp., supra.* That case involved a seizure of an automobile in order to satisfy a tax debt to the United States, a situation which is similar to a private repossession of an automobile to satisfy a debt. The language in this opinion concerning expectation of privacy on a public street must be read in context of the facts of the case. A person who is in default on a debt or who is subject to a judgment lien does not have a reasonable expectation that his property will not be repossessed on a public street. On the other hand, a person has a reasonable expectation that if the government is seizing his property other than for purposes of satisfying a debt, a warrant will be secured. It is difficult to respond to the argument concerning the theory that if you once believed that the car contained drugs, you may forever seize the car based on exigent circumstances. This theory fails to recognize that both probable cause and exigent circumstances become stale and will no longer support the legality of a later seizure. *Cf. Montgomery v. State,* 584 So.2d 65 (Fla. 1st DCA 1991).

The argument relied on by the majority for upholding the search, that property may be seized based on probable cause much like a person, while having some initial facial appeal, is still equally unpersuasive. Neither the Supreme Court of the United States nor the Florida Supreme Court has accepted this position.

General application of this concept would serve to totally emasculate the warrant requirements for the seizure of an automobile announced in *Coolidge, supra.* In addition, the position taken by the majority does not deviate from the argument that somehow the forfeiture statute authorizes warrantless seizures of property absent exigent circumstances, the very argument which is rejected in *In re: Warrant to Seize One 1988 Chevrolet Monte Carlo,* 861 F.2d 307, 311 (1st Cir.1988), and *O'Reilly v. United States,* 486 F.2d 208, 214 (8th Cir.1973).

I, therefore, see no reason to depart from the rule announced by the Supreme Court in *Coolidge, supra,* and alluded to by our supreme court in *Department of Law Enforcement,* that an automobile is not subject to warrantless seizure absent exigent circumstances.

FN1. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FN2. The charges on which White was arrested are not the subject of the instant appeal.

FN3. Here, the police had probable cause to believe White's vehicle had been used to facilitate the sale of cocaine, as indicated by the following trial testimony:

> THE COURT: Do you know what basis existed at the time you made the arrest and searched the car to file a forfeiture proceeding, what information did you have that that vehicle had been used in illegal activity?
>
> OFFICER SQUIRE: These were all Doug Pierce's cases, it's my understanding this vehicle had been used to deliver and sell cocaine on at least two occasions, maybe three.
>
> PROSECUTOR: And you had been present at at least one of those sales?

OFFICER SQUIRE: Yes.

THE COURT: A sale from the car?

OFFICER SQUIRE: Yes.

FN4. White has not challenged the forfeiture on due process grounds and we do not address due process issues here. *See, Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 676-80, 94 S.Ct. 2080, 2088-90, 40 L.Ed.2d 452 (1974)(due process does not require federal law enforcement officers to obtain a warrant prior to seizing property they have probable cause to believe is subject to forfeiture); *U.S. v. Valdes*, 876 F.2d 1554, 1560 at fn. 12 (11th Cir.1989)(due process is satisfied under forfeiture statute "if the government is required to have a sound basis for believing that property is forfeit, and the owner has a fair opportunity to regain it."); *Smith v. Hindery*, 454 So.2d 663 (Fla. 1st DCA 1984)(Forfeiture Act does not violate due process).

FN5. In each of *Dixon, Lasanta* and *Linn*, the court, while holding that the warrant requirement applied to seizures for the purpose of forfeiture, still found another method of admitting the evidence. In *Dixon*, the court held the search and seizure to be illegal, but concluded that a pound of cocaine, found days after the car was seized and discovered only when the cellular phone was being removed, was in plain view and admissible under that exception to the warrant requirement. 1 F.3d at 1084. In *Lasanta*, after concluding that the search and seizure was illegal, the court found it to be harmless error and affirmed the conviction. 978 F.2d at 1306. In *Linn*, the court found the warrantless seizure of a motor vehicle was reasonable because the mobility of the vehicle, in effect, created "exigent circumstances." 880 F.2d at 215 ("... the 'mobility' underpinning of the automobile exception is, of course, closely related to our 'exigent circumstances' analysis, and is the compelling factor.").

FN6. *See also O'Reilly v. United States*, 486 F.2d 208, 214 (8th Cir.), *cert. denied*, 414 U.S. 1043, 94 S.Ct. 546, 38 L.Ed.2d 334 (1973); *In re: Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 311 (1st Cir.1988) (notes the continuing validity of *United States v. Pappas*, 613 F.2d 324, 330 (1st Cir.1979), where court held that the federal forfeiture statute would only be constitutional if construed to allow seizure "only when seizure immediately follows the occurrence that gives the federal agents probable cause ... and the exigencies of the surrounding circumstances make the requirement of obtaining process unreasonable or unnecessary").

FN7. In *United States v. Bagley*, 772 F.2d 482 (9th Cir.1985), the court appears to abandon *McCormick* and *Spetz* relying on *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Both *Bagley* and *Carney*, however, involve cases where the police had reasonable grounds to believe that either contraband or evidence would be found in the vehicle at the time of the seizure or search. Such a reasonable belief did not exist in this case.

FN8. In *U.S. v. Decker*, 19 F.3d 287 (6th Cir.1994), relied on by the majority, the vehicles were properly seized pursuant to a warrant, and the focus concerned the propriety of the inventory after the vehicle was searched. I do not quarrel with the legitimacy of the inventory search but unlike *Decker*, in the instant case, the legality of the seizure is at issue.

SUPREME COURT OF FLORIDA

TYVESSEL TYVORUS WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

No. 88,813

[February 26, 1998]

ANSTEAD, J.

We have for review the opinion in White v. State, 680 So. 2d 550 (Fla. 1st DCA 1996). We accepted jurisdiction to answer the following question certified to be of great public importance:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.

Id. at 555. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed below, we answer the certified question

in the affirmative. We hold that a citizen's property is protected by the federal and Florida constitutions against warrantless seizure even when the seizure is done pursuant to a statutory scheme for forfeiture.

MATERIAL FACTS[1]

On October 14, 1993, petitioner Tyvessel Tyvorus White (White) was arrested at his place of employment on charges unrelated to this case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been used several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture by the government.[2] After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.

Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury.

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[1]The following facts are taken from the First District's opinion. White, 680 So. 2d at 551-55.

[2]The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993. We commend the State's candor in providing these dates during oral argument. As both parties noted at oral argument, the record is unclear as to the actual dates. The State noted that these dates are contained in White's motion for postconviction relief under Florida Rule of Criminal Procedure 3.850.

White was thereafter convicted of possession of cocaine; and subsequently the trial court formally denied White's objection and motion to suppress the cocaine evidence.

On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993) (hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures.[3] In dissent, Judge Wolf asserted that the "warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as a result of prior narcotics transactions." White, 680 So. 2d at 557 (Wolf, J., concurring in part and dissenting in part).

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[3]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amend. IV, U.S. Const. In 1982, article I, section 12 of the Florida Constitution was amended to add what has become known as the conformity clause because "we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and provide no greater protection than those interpretations." Bernie v. State, 524 So. 2d 988, 990-91 (Fla. 1988); see Soca v. State, 673 So. 2d 24, 27 (Fla.), cert. denied, 117 S. Ct. 273 (1996).

Because the court found that neither this Court nor the United States Supreme Court had addressed the issue of whether law enforcement agencies must obtain a warrant prior to seizing a citizen's property under the Florida Contraband Forfeiture Act, the First District certified the issue as one of great public importance to this Court.

LAW AND ANALYSIS

In holding that no prior court authorization was required in order to seize and search White's vehicle, the First District majority applied the "automobile exception" to the warrant requirement. While we recognize the continuing validity of the "automobile exception" to the warrant requirement, we find it inapposite here.

In his dissent, Judge Wolf relied primarily on the opinion of the United States Court of Appeals for the Second Circuit in U.S. v. Lasanta, 978 F.2d 1300 (2d Cir. 1992).[4]

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[4]Because Lasanta contains a comprehensive and reasoned treatment of this issue, we quote from the Second Circuit's opinion at length:

> A threshold question presented here is whether the government's seizure of the car, without a warrant, as a civil forfeiture, was authorized. The forfeiture statute, 21 U.S.C. §881, gives power to the attorney general to seize for forfeiture, inter alia, a vehicle that is used to facilitate a narcotics transaction. In carrying out such a statutorily authorized seizure, however, agents of the attorney general must also obey the constitution, particularly the fourth amendment's command that there be no unreasonable seizures.
>
> . . . .
>
> We find no language in the fourth amendment

suggesting that the right of the people to be secure in their "persons, houses, papers, and effects" applies to all searches and seizures except civil-forfeiture seizures in drug cases. U.S. Const. amend. IV. We reject out of hand the government's argument that congress can conclusively determine the reasonableness of these warrantless seizures, and thereby eliminate the judiciary's role in that task of constitutional construction. See U.S. Const. art. VI, cl. 2. While congress may have intended civil forfeiture to be a "powerful weapon in the war on drugs", United States v. 141st Street Corp. by Hersh, 911 F.2d 870, 878 (2d Cir. 1990) (noting statute's legislative history), cert. denied, 498 U.S. 1109, 111 S. Ct. 1017, 112 L. Ed. 2d 1099 (1991), it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the constitution itself a casualty.

. . . .

To be valid, therefore, this warrantless seizure must meet one of the recognized exceptions to the fourth amendment's warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564 (1971). Surely the government cannot argue that the canister, tucked underneath the driver's seat, was found in the plain view of an investigative officer in a place she was entitled to be. See, e.g., Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (explaining the elements of a plain-view seizure). Nor does the government claim that the search was incident to Cardona's arrest, which occurred on the doorstep of Cardona's home. See, e.g., Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2039-40, 23 L. Ed. 2d 685 (1969) (police may search arrestee's person and area within

his immediate control incident to arrest). The substantial distance between the site of Cardona's arrest and the vehicle in the driveway forecloses any question of the agents' need to search the vehicle for weapons to ensure their safety during the arrest. Chimel, 395 U.S. at 763, 89 S. Ct. at 2040 (noting that safety animates this seizure rationale).

The government does not even suggest that exigent circumstances might justify its warrantless seizure of the vehicle. See, e.g., Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (outlining the automobile exception to the warrant requirement); Carroll v. United States, 267 U.S. 132, 146, 45 S. Ct. 280, 282, 69 L. Ed. 543 (1925) (noting rationale of automobile exception). Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep.

Nor was it impractical for the agents to obtain a warrant to seize Cardona's car. See, e.g., United States v. Paroutian, 299 F.2d 486, 488 (2d Cir. 1962) (search upheld when exceptional circumstances rendered it impractical to secure warrant). Previous surveillance had made agents aware of the vehicle's presence, thus enabling them to have requested and obtained a search warrant during either of their two attempts to secure a warrant to arrest Cardona. Even if the agents had been surprised by the presence of the limousine, and

He also noted this Court's opinion in Department of Law Enforcement v. Real Property, 588 So. 2d 957, 963 n.14 (Fla. 1991), wherein we recognized that because "article I, section 12 of the Florida Constitution expressly requires conformity with the fourth amendment of the United States Constitution, the warrant requirement of article I, section 12 also applies to seizures in forfeiture actions under Florida law." White, 680 So. 2d at 558 (Wolf, J., concurring in part and dissenting in part).

DEPARTMENT OF LAW ENFORCEMENT

In Department of Law Enforcement, we were able to uphold the constitutionality of Florida's forfeiture act only by imposing numerous restrictions and safeguards on the use of the act in order to protect a citizen's property from arbitrary action by the government. In discussing the act we declared:

> The Act raises numerous constitutional concerns that touch upon many substantive and procedural rights protected by the Florida Constitution. In construing the Act, we note that forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity. Therefore, this Court has long followed a policy that it must strictly construe forfeiture statutes.

588 So. 2d at 961. The major thrust of our holding was that in order to comply with constitutional due process requirements, the government must strictly observe a citizen's constitutional protections when invoking the drastic remedy of forfeiture of a

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> even if they harbored probable cause to suspect it contained evidence of narcotics-related activity, they still could have posted an agent to remain with the vehicle, and then secured a search warrant.

Id. at 1303-06. This reasoning is sound and speaks for itself.

citizen's property. In addition to expressly holding that the Fourth Amendment applies to forfeiture attempts by the government, we specifically explained:

> In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the court shall authorize seizure of the personal property if it finds probable cause to maintain the forfeiture action.

Id. at 965. We conclude that the government's unauthorized and warrantless seizure, absent exigent circumstances not established here, clearly violated the constitutional safeguards we recognized in Department of Law Enforcement.

The government did not seek a warrant or an "ex parte preliminary hearing" here in order to secure a neutral magistrate's determination of probable cause. The government just seized the property, thereby putting the property owner and any others claiming an interest in the property in the position of having to take affirmative action against the government in order to protect their rights. This is the very antithesis of the cautious procedure we mandated in Department of Law Enforcement. We simply cannot accept the government's position that it may act at anytime, anywhere, and regardless of the existence of exigent circumstances, or a change in ownership or possession, to seize a citizen's property once believed to have been used in illegal activity, without securing the authorization of a neutral magistrate.

AUTOMOBILE EXCEPTION

As previously noted, the only basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement. The district court majority cited California v. Carney, 471 U.S. 386, 391 (1985), for the proposition that automobiles are afforded less Fourth Amendment

protection against warrantless searches and seizures due to their "ready mobility" and diminished expectations of privacy due to their pervasive governmental regulation. The automobile exception is predicated upon the existence of exigent circumstances consisting of the known presence of contraband in the automobile at the time, combined with the likelihood that an opportunity to seize the contraband will be lost if it is not immediately seized because of the mobility of the automobile. See Chambers v. Maroney, 399 U.S. 42 (1970). For example, in Carney, law enforcement officers had direct evidence that illegal drugs were present and that the suspect was distributing illegal drugs from the vehicle. Accordingly, the Court concluded that the officers "had abundant probable cause to enter and search the vehicle for evidence of a crime." Carney, 471 U.S. at 395.

Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that Carney and the automobile exception are inapposite as authority. There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity. The exigent circumstances implicit in the former situation are simply not present in the latter situation.

The automobile exception is a narrow, situation-dependent exception which requires much more than the fact that an automobile is the object sought to be seized and searched.

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[5]A young man who had just left the motor home only moments before told agents of the Drug Enforcement Administration that he had received marijuana from the suspect while in the motor home. Carney, 471 U.S. at 388.

Critically, there must be probable cause to believe contraband is in the vehicle at the time of the search and seizure, Carney,[6] and there must be some legitimate concern that the automobile "might be removed and any evidence within it destroyed in the time a warrant could be obtained." Lasanta, 978 F.2d at 1305. The majority opinion below simply failed to address the fundamental requirement of Carney:

> In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause [to believe contraband is in the vehicle] is met.

471 U.S. at 392 (emphasis added).

As is vividly demonstrated in the Lasanta case, cited by Judge Wolf, the automobile exception does not apply to either the facts of that case or White's case. See White, 680 So. 2d at 557 (Wolf, J., concurring in part and dissenting in part) (noting that White was arrested at his workplace, his car keys were in his pocket, and his car was parked outside in his company's parking lot). In Lasanta, the court could easily have been writing about this case when it described the obvious absence of exigent circumstances in the government's forfeiture seizure:

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[6]See also Pennsylvania v. Labron, 116 S. Ct. 2485, 2487 (1996) (reaffirming Carney in reasoning that if a car "is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more"); California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained").

> The government does not even suggest that exigent circumstances might justify its warrantless seizure of the vehicle. See, e.g., Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (outlining the automobile exception to the warrant requirement); Carroll v. United States, 267 U.S. 132, 146, 45 S. Ct. 280, 282, 69 L. Ed. 543 (1925) (noting rationale of automobile exception). Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep.

978 F.2d at 1305. Similarly, the absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here. The exception does not apply when no probable cause exists and the police arrest either a sleeping suspect, Lasanta, or a suspect at work with the keys in his pocket. White. There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately.

SEIZURE OF PROPERTY VS. SEIZURE OF PERSON

Finally, the reasoning of the district court majority, that since a defendant's person can be seized without a warrant his property should be no different, simply proves too much. If we were to follow that reasoning to its logical conclusion we would, in

essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property.[7] It will always be more intrusive to seize a person than it will be to seize his property. That is the nature of human values. However, such an approach would apparently have us do away with the constitutional law of search and seizure as to property entirely, simply because we have permitted the warrantless arrest of a person.

The United States Supreme Court has purposely subjected the Fourth Amendment to only a "few well-delineated exceptions." Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). For example, the courts have carefully restricted the law of search and seizure to permit a limited search of an arrestee and his person "incident" to a valid arrest. See Chimel v. California, 395 U.S. 752 (1969). However, the reasoning of the district court majority, if carried to its logical bounds, would do away with the limitations established to a search incident to a lawful arrest and now permit a search of anything, anywhere, based upon probable cause, without a warrant, since those actions involving property would obviously be less intrusive than seizing the person. Obviously, we are not willing to accept such a proposition and its implications.[8]

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[7]As Chief Justice Kogan recently reminded us, the genius of our federal and state constitutions is that they define basic rights that neither the legislative nor executive branches can modify. Krischer v. McIver, 697 So. 2d 97, 112 (Fla. 1997) (Kogan, C.J., dissenting). These remarkable documents fenced off from the "ordinary political process" these rights guaranteed all Americans by ensuring they "could not be repealed by a mere majority vote of legislators nor . . . alter[ed] through any process except constitutional amendment." Id. at 112-13.

[8]As Judge Wolf correctly observed in his dissent below, the Fourth Amendment mandates that absent exigent circumstances, police must secure a warrant for the search and seizure of an automobile. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

CONCLUSION

In the end, the maintenance of an orderly society mandates that a citizen's property should not be taken by the government, in the absence of exigent circumstances, without the intervention of a neutral magistrate. Certainly the warrant requirement would have posed no undue burden on the government here where the vehicle was parked safely at the petitioner's place of employment and the government had the keys and the petitioner in custody. Moreover, any inconvenience to the government pales in comparison to the consequences for our justice system and constitutional order if such abuses are left unchecked. See Department of Law Enforcement. As the Second Circuit poignantly observed in Lasanta, 978 F.2d at 1305, "it would, indeed, be a Pyrrhic victory for the country, if the government's imaginative use of that weapon [civil forfeiture] were to leave the constitution itself a casualty."

In summary, we answer the certified question in the affirmative and hold that the warrantless seizure of a citizen's property is protected by the federal and Florida constitutions even when the seizure is made pursuant to a statutory forfeiture scheme. Accordingly, we quash the First District's opinion and remand this case for proceedings consistent herewith.

It is so ordered.

KOGAN, C.J., SHAW and HARDING, JJ., and GRIMES, Senior Justice, concur.
WELLS, J., dissents with an opinion, in which OVERTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

WELLS, J., dissenting.

For more than twenty-three years, Florida's forfeiture statute has been enforced by Florida courts, including this Court, as the legislature wrote it. Today, by this decision, the majority judicially amends this twenty-three-year-old statute and places Florida in the minority of federal and state jurisdictions, which require a preseizure warrant in order to enforce forfeiture statutes. Today's decision also puts our state procedure at odds with federal forfeitures in Florida since the Eleventh Circuit is among the majority of jurisdictions which recognize that warrantless seizures pursuant to forfeiture statutes are not in violation of the Fourth Amendment to the United States Constitution.

Indeed, Coolidge's holding remains good law to the extent that "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" Id. at 468. Moreover, in the case that overruled Coolidge in part, Horton v. California, 496 U.S. 128 (1990), the Supreme Court not only reaffirmed Coolidge's essential holding but also noted that it had extended "the same rule to the arrest of a person in his home." Id. at 137 n.7. Therefore, since no exigent circumstances existed in this case, the warrantless seizure of White's car was unconstitutional. See Coolidge, 403 U.S. at 454-55 (reaffirming rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions") (emphasis added). Even though automobiles are afforded lesser Fourth Amendment protection, there is still a strong presumption against warrantless searches and seizures of a citizen's property by the government, absent exigent circumstances. See Coolidge, 403 U.S. at 468 (reiterating that "even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure"). Coolidge's requirement that a "plain view" seizure must also be "inadvertent" was overruled in Horton, 496 U.S. at 140. Minus that incidental reasoning, Coolidge remains good law.

I dissent because I agree with the majority of jurisdictions and the Eleventh Circuit and do not believe that this change in the law of Florida is suddenly required by the Fourth Amendment. The case of United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), upon which the majority opinion relies, is clearly the minority view.

The seizure in this case was not an unusual enforcement of Florida's forfeiture law or contrary to forfeitures which the appellate courts of Florida have approved since the inception of the statute. Clearly, the period of time between when the police eyewitnesses and the video-tape evidence showed the vehicle being used in the delivery and sale of cocaine and the seizure of the vehicle was within previous approvals by Florida courts. Soon after the forfeiture statute became effective on October 1, 1974, it was recognized that proof of past violations may be the basis for forfeiture. State v. One 1977 Volkswagen, 455 So. 2d 434 (Fla. 1st DCA 1984) (police properly seized a vehicle based upon drug transaction occurring almost two months prior to seizure), approved, 478 So. 2d 347 (Fla. 1985); Knight v. State, 336 So. 2d 385, 387 (Fla. 1st DCA 1976), cert. denied, 345 So. 2d 427 (Fla. 1997).

In 1983, the Second District directly confronted the issue of whether a preseizure warrant needed to be obtained. The Second District held that it did not in State v. Pomerance, 434 So. 2d 329, 330 (Fla. 2d DCA 1983), stating:

> We have found no case addressing this issue. However, section 932.703, Florida Statutes (1981), which provides for the forfeiture of motor vehicles used to transport, conceal, or facilitate the sale of contraband, in violation of section 932.703, nowhere mentions obtaining a warrant; it simply states that an offending vehicle "shall be seized." We know of no rationale for judicially engrafting onto the statute a requirement that a warrant be obtained.

(Emphasis added.)

In 1985, in Duckham v. State, 478 So. 2d 347 (Fla. 1985), this Court did an analysis of the forfeiture statute and cases from our district courts and federal circuit courts and upheld the forfeiture of a motor vehicle seized almost two months after the vehicle had been used to facilitate a drug transaction. It is important to note that this seizure of the motor vehicle was not based upon there being probable cause to believe that there was contraband in the vehicle at the time of or before its seizure. The district court's decision in Duckham was approved with this Court noting:

> Even though no drugs had been transported in the car, no conversations had taken place in the car, the policeman had never been in the car, and Duckham used the car solely to transport himself to the restaurant where he struck the deal and then to his apartment, the district court found that Duckham used his car to facilitate the sale of contraband within the meaning of subsection 932.702(3), Florida Statutes (1981).

478 So. 2d at 348.

Also in 1985, this Court upheld the forfeiture statute against a due-process attack in Lamar v. Universal Supply Co., Inc., 479 So. 2d 109 (Fla. 1985). This Court specifically stated:

> The seizure of property pursuant to a forfeiture statute constitutes an extraordinary situation in which postponement of notice and hearing until after seizure does not deny due process. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974). The due process rights of claimants are adequately protected, therefore, by the requirement that the state attorney promptly file a forfeiture action following seizure. § 932.704(1), Fla. Stat. (1983).

479 So. 2d at 110.

In 1989, in an opinion written by Justice Overton, this Court did another extensive analysis of this statute in State v. Crenshaw, 548 So. 2d 223 (Fla 1989), and strongly upheld the enforcement of this statute.

The majority here cites to this Court's 1991 analysis of the forfeiture statute in Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). However, the majority's quote omits the following sentence which completes the paragraph from which the quote in the majority opinion is taken: "In those situations where a law enforcement agency already has lawfully taken possession of personal property during the course of routine police action, the state has effectively made an ex parte seizure for the purposes of initiating a forfeiture action." 588 So. 2d at 965. Through the date of that opinion (in fact until today) law enforcement agencies were considered to have lawfully taken possession of personal property when possession was taken on the basis of and in conformity with the forfeiture statute. Lamar, 479 So. 2d at 110.

When Department of Law Enforcement is read in full context, that decision cannot be fairly said to engraft a warrant requirement into the statute. This was the reading given to that decision by the Second District in In re Forfeiture of 1986 Ford, 619 So. 2d 337, 338 (Fla. 2d DCA 1993), when it held that "nothing in [Department of Law Enforcement] or the forfeiture statute requires a warrant, consent or exigent circumstances."

Furthermore, the majority opinion here incorrectly states that "the only basis asserted for the unauthorized government seizure here is the so-called automobile exception to the warrant requirement." Majority op. at __. What the district court actually said was, "We are also influenced in our holding by the fact that the property seized here was a motor vehicle . . . ." White v. State, 680 so. 2d 550, 554 (Fla. 1st DCA 1996). The district

court's opinion therefore correctly pointed out that privacy interests in a motor vehicle have a lesser degree of Fourth Amendment protection because of a vehicle's mobility and because the expectation of privacy is less than that relating to one's home or office, citing to California v. Carney, 471 U.S. 386 (1985). The statement by the district court majority is indisputably correct.

However, the clear reason for the district court majority's decision is the compelling development of precedent in Florida in respect to the statute, which the majority in this Court simply casts aside without mention, and the weight of authority from both federal and state jurisdictions, which the majority fails to acknowledge. One case representing the majority view is from the Eleventh Circuit: United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989). The district court majority followed the reasoning of the Eleventh Circuit in Valdes. The rejection of Valdes by this Court's majority places Florida in the illogical (and I believe untenable) situation of there being a warrantless seizure available to federal law enforcement pursuant to the federal forfeiture statute because it is not a violation of the Fourth Amendment to the United States Constitution and a warrantless seizure not being available to Florida law enforcement pursuant to a substantially similar state forfeiture statute because of a holding by this Court that a warrantless seizure is in violation of the Fourth Amendment to the United States Constitution. Though we are not bound to do it, I believe this Court should apply the Fourth Amendment to the United States Constitution in accord with its application by the federal circuit court that has Florida within its jurisdiction. This is particularly so when the Eleventh Circuit's decision is in accord with the majority of other jurisdictions.

I believe the Seventh Circuit clearly expressed correctly the state of the law in federal and state jurisdictions in United States v. Pace, 898 F.2d 1218, 1241 (7th Cir. 1990), when it said:

> The weight of authority, however, holds that police may seize a car without a warrant pursuant to a forfeiture

statute if they have probable cause to believe the car is subject to forfeiture. See, e.g., United States v. Valdes, 876 F.2d 1554, 1558-60 (11th Cir. 1989); United States v. $29,000--U.S. Currency, 745 F.2d 853, 856 (4th Cir. 1984); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983); United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 158 (3d Cir. 1981); United States v. One 1975 Pontiac LeMans, 621 F.2d 444, 450 (1st Cir. 1980) (citing cases). We agree with the majority approach. The federal courts' overwhelming approval of warrantless forfeiture seizures based on probable cause, along with the historical acceptance of the constitutionality of such searches, are evidence that such searches have been generally accepted as reasonable. See United States v. Bush, 647 F.2d 357, 370 (3d Cir. 1981) (citing cases). It is difficult to ignore this general acceptance. Furthermore, under a civil forfeiture statute, "the vehicle . . . is treated as being itself guilty of wrongdoing." United States v. One Mercedes Benz 280S, 618 F.2d 453, 454 (7th Cir. 1980). Thus, seizing a car from a pubic place based on probable cause is analogous to arresting a person outside the home based on probable cause. Such an arrest, even without a warrant, does not violate the Fourth Amendment, although it is possibly a more significant intrusion on privacy interests than seizing an unoccupied car. See Bush, 647 F.2d at 370 (citing United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)); see also Valdes, 876 F.2d at 1559; One 1978 Mercedes Benz, 711 F.2d at 1302. And the Supreme Court has approved warrantless seizures in a similar situation. In G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), Internal Revenue Service agents seized cars subject to tax liens without a warrant. The Court held that the seizures did not violate the Fourth Amendment; the agents had probable cause to believe that the cars were subject to seizure, and the seizures took

> place "on public streets, parking lots, or other open places." See id. at 351-52, 97 S. Ct. at 627-28; G.M. Leasing provides strong support for the majority position. See One 1975 Pontiac LeMans, 621 F.2d at 450, which adopted the panel's reasoning in United States v. Pappas, 600 F.2d 300, 304 (1st Cir.), vacated 613 F.2d 324 (1st Cir. 1979); Bush, 647 F.2d at 369; see also 3 Wayne R. LaFave, Search and Seizure § 7.3(b), at 83 (2d ed. 1987). For all these reasons, we conclude that it was proper for the police to seize Pace's and Besase's cars from the parking lot of Savides' condominium complex, if the police had probable cause to believe the cars were subject to forfeiture.

(Emphasis added; footnote omitted.) See also United States v. Musa, 45 F.3d 922, 924 (5th Cir. 1995). I would continue Florida's adherence to this view.

Assuming that the warrantless seizure was authorized, there is no doubt that the inventory search was appropriate. See Caplan v. State, 531 So. 2d 88 (Fla. 1988); Padron v. State, 449 So. 2d 811 (Fla. 1984).

OVERTON, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 94-2823
(Bay County)

Nancy A. Daniels, Public Defender and David P. Gauldin, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Petitioner

Robert A. Butterworth, Attorney General; James W. Rogers, Bureau Chief, Criminal Appeals and Daniel A. David, Assistant Attorney General, Tallahassee, Florida,

for Respondent

SUPREME COURT OF FLORIDA

MONDAY, JUNE 1, 1998

TYVESSEL TYVORUS WHITE,	*
	*
Petitioner,	*
	* CASE NO. 88,813
v.	* District Court of Appeal
	* 1st District-No.94-2823
STATE OF FLORIDA,	*
	*
Respondent.	*
	*
* *	

Respondent's Motion for Rehearing is hereby denied.

KOGAN, C.J., SHAW, HARDING and ANSTEAD, JJ., and GRIMES, Senior Justice, concur.
OVERTON and WELLS, JJ., dissents.

A True Copy	TC
	cc: Hon. Jon S. Wheeler, Clerk
TEST	Hon. Harold Bazzel, Clerk
	Hon. Clinton E. Foster, Judge
Sid J. White	Mr. David P. Gauldin
Clerk, Supreme Court	Mr. James W. Rogers
	Mr. Daniel A. David

(3)

Case No. 98-223

In The
Supreme Court Of The United States
October Term 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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38pp

QUESTION PRESENTED

The question presented in Florida's petition for writ of certiorari was:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A WARRANT IS REQUIRED BY THE FOURTH AMENDMENT TO SEIZE A MOTOR VEHICLE UNDER A CONTRABAND FORFEITURE ACT AND FOR SUBSEQUENT SEARCH OF SAID VEHICLE CONFLICTS WITH DECISIONS OF THE COURT IN CARROLL V. UNITED STATES, CALERO-TOLEDO V. PEARSON YACHT LEASING, AND COOPER V. CALIFORNIA, THAT OF THE ELEVENTH CIRCUIT IN UNITED STATES V. VALDES AND THE MAJORITY OF STATE COURTS ADDRESSING THIS ISSUE?

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STATE STATUTES

Case No. 98-223

In The
Supreme Court of the United States
October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as White v. State, 710 So.2d 949 (Fla. 1998). (JA 64-84).

The opinion of the District Court of Appeal, First District of Florida is reported as White v. State, 680 So.2d 550 (Fla. 1st DCA 1996). (JA 44-63).

Respondent filed a motion to suppress which is not reported. The trial court reserved ruling on the motion to suppress. (JA 25). The trial court denied the motion. (JA 10,41).

JURISDICTION

The Supreme Court of Florida issued its decision on February 26, 1998. Petitioner's Motion for Rehearing was denied on June 1, 1998. On July 31, 1998, Florida filed a petition for writ of certiorari, which the Court granted on November 16, 1998. This court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, §12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. This right shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States

Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The material facts, as set out in the body of the Florida Supreme Court's decision, are as follows:

> On October 14, 1993, petitioner Tyvessel Tyvorus White (White) was arrested at his place of employment on charges unrelated to his case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been used several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture by the government. After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.
>
> Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine, and subsequently the trial court formally denied White's objection and motion to suppress the cocaine evidence.
>
> On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993) (hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures.

(JA 65-66).

The dates of those prior occasions when White's automobile was used to facilitate illegal drug activity were July 26, August 4, and August 7, 1993. (JA 65, n.2). On those occasions, White was seen by police eyewitnesses, and was videotaped utilizing his car to deliver cocaine. (JA 33, 45).

White's conviction was affirmed by the Florida First District Court of Appeal. White v. State, 680 So.2d 550 (Fla. 1st DCA 1996). Pursuant to Florida law, the District Court certified the following question to the Florida Supreme Court as being of great public importance:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.

(JA-52).

The Florida Supreme Court accepted jurisdiction and answered the question in the decision under review here, White v. State, 710 So.2d 949 (Fla. 1998). (JA 64-84).

SUMMARY OF ARGUMENT

The decision of the Florida Supreme Court that the Fourth Amendment requires a warrant for seizure of an automobile under a contraband forfeiture act is not compelling. Such conclusion is contraindicated by decisions of the Court on the subject matter, erects an inflexible procedural barrier in the path of effective law enforcement, and adds no new protection for the owner of the automobile seized. The decision ignores

that the property itself, rather than the owner, is deemed "guilty" for forfeiture purposes and provides more constitutional process for the property than for the owner.

In so deciding, the Florida Supreme Court rejected controlling Eleventh Circuit precedent expressing the majority view and adopted instead the minority view expressed in a Second Circuit decision. The Florida Supreme Court's warrant requirement under the Fourth Amendment does what is neither required nor practical: it elevates the judicial preference for warrants under the Fourth Amendment into a rigid absolute. The result, as here, is an unsupportable infringement on practical, flexible law enforcement.

The Court should apply settled law, that the Fourth Amendment does not require a warrant for forfeiture where probable cause exists and further conclude that the automobile exception to the warrant requirement of the Fourth Amendment equally applies to forfeiture proceedings.

ARGUMENT

WHETHER THE FOURTH AMENDMENT REQUIRES AN ANTECEDENT WARRANT FOR SEIZURE OF A MOTOR VEHICLE UPON PROBABLE CAUSE UNDER A CONTRABAND FORFEITURE ACT (RESTATED)

The decision of the Florida Supreme Court below, holding that the Fourth Amendment requires a warrant before seizure of a vehicle under a contraband forfeiture act, is constitutionally unsound because it (1) reaches a result contrary to the Court's precedents on the subject matter,[1] (2) elevates the judicial preference for warrants under the Fourth Amendment

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[1] In Calero-Toledo v. Person Yacht Leasing Co., 416 U.S. 663 (1974), the court, in deciding whether *ex parte* seizures of forfeited property met due process concerns held that the government could seize a yacht under the forfeiture statute without prior notice or judicial hearing. See also: United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989) (*ex parte* seizure of automobile under forfeiture statute does not violate Fourth Amendment under any Supreme Court precedent). The majority view of the federal circuits, as set out in Valdes, is that no antecedent warrant is required for seizure, search, and forfeiture of an automobile under a civil forfeiture act. United States v. Pace, 898 F. 2d 1218 (7th Cir.), cert. denied, 497 U.S. 1030, 110 S. Ct. 3286, 111 L. Ed. 2d 1218 (1990);United States v. One 1978 Mercedes Benz, 711 F. 2d 1297 (5th Cir. 1983); United States v. Kemp, 690 F. 2d 397 (4th Cir. 1982); United States v. Bush, 647 F. 2d 357 (3d Cir. 1981). The minority view as discussed in United States v. Lasanta, 978 F. 2d 1300 (2d Cir. 1992), was adopted by the Tenth Circuit in United States v. Dixon, 1 F. 3d 1080 (10th Cir. 1995), wherein the court held that either a warrant or a recognized exception thereto was required for a valid seizure. An intermediate approach has been adopted by other circuits, limiting the validity of warrantless seizure under forfeiture statutes to situations where there is an exigent exception to the warrant requirement. See for example: United States v. Linn, 880 F. 2d 209 (9th Cir. 1989).

to a rigid, unwarranted constitutional mandate,[2] (3) frustrates and hampers effective, flexible law enforcement by engrafting a procedural requirement that affords no additional protection for either a guilty or innocent owner of a seized automobile,[3] and (4) elevates protection of an accused's property over that of his person.[4] The Florida Supreme Court characterized its reasoning in White as a reaffirmation of an earlier decision in Department of Law Enforcement v. Real Property, 588 So.2d 957, 965 (Fla. 1991), that "we were only able to uphold the constitutionality of Florida's forfeiture act by imposing numerous restrictions and safeguards on the use of the act in

---

[2] While other jurisdictions may be inclined or have statutory or constitutional provisions authorizing judicial intervention prior to a seizure in forfeiture, the Florida Supreme Court, since 1982, has been prohibited from interpreting the fourth amendment in a fashion contrary to decisions of this Court. See: Art. I, Sec. 12 of the Florida Constitution, known as the conformity clause, mandates that the court be "bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and **provide no greater protection than those interpretations**." Bernie v. State, 524 So. 2d. 988, 990-91 (Fla. 1988) (emphasis added).

[3] See United States v. Valdes, supra, where the court, citing to United States v. Watson, 423 U.S. 411 (1976), observed "The Court upheld Watson's arrest by balancing the interest of the individual citizen in maintaining his liberty against the public's need to control crime. The Court then concluded that if it gave "maximum protection [to] individual rights . . . by requiring a magistrate's review of the factual justification prior to any arrest," it would create "'an intolerable handicap for legitimate law enforcement.'" Id., at 417-18, 96 S.Ct at 825 (quoting Gerstein v. Pugh, 420 U.S. 103, 113, 95 S.Ct. 854, 862, 43 L.Ed.2d 54 (1975))." 876 F.2d at 1559.

[4] See: Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576 (1967) (The instrumentality of the drug dealer's criminal conduct should gain no greater protection than the dealer himself.)

order to protect a citizen's property from arbitrary action by the government." White, 710 So. 2d at 950. In fact, as the dissent points out, the

> majority's quote omits the following sentence which completes the paragraph from which the quote in the majority opinion is taken: 'In those situations where law enforcement agency already has lawfully taken possession of personal property during the course of routine police action, the state has effectively made an *ex parte* seizure for the purposes of initiating a forfeiture action. 588 So.2d at 965. Through the date of that opinion (in fact until today) law enforcement agencies were considered to have lawfully taken possession of personal property when possession was taken on the basis of and in conformity with the forfeiture statute. Lamar [v. Universal Supply Co., 479 So.2d 109 (Fla. 1985)], 479 So.2d at 110. When Department of Law Enforcement is read in full context, that decision cannot be fairly said to engraft a warrant requirement into the statute.

White, 710 So.2d. at 956 (Fla. 1998) (Wells, dissenting). Moreover, the majority in White, finding no guidance in decisions from this Court, rejected a controlling circuit opinion in United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989), and opted for a minority view from another circuit in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), concluding:

> Similarly, the absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here. The exception does not apply when no probable cause exists and the police arrest either a sleeping suspect, Lasanta, or a suspect at work with the keys in his pocket. White. There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to

search the vehicle for contraband known to be therein, and that might be lost if not seized immediately.

710 So.2d at 953-954.

As a result of the Florida Supreme Court's decision, a clear opportunity to resolve an unaddressed question left open in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 2090, 40 L.Ed.2d 452, n.14 (1974), has arisen. Specifically, whether the warrant or probable cause requirements of the Fourth Amendment are applicable to a forfeiture statute and, whether, as the court in White opined, to what extent "the warrantless seizure of a citizen's property is protected by the federal and Florida constitutions even when the seizure is made pursuant to a statutory forfeiture scheme."

Previous decisions of the Court on seizure questions strongly suggest the answer is "no".[5]

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[5] No warrant was obtained in Calero-Toledo. Nor was a warrant required for the seizure in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), or in Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), nor in Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931). No intervening warrant was necessary for the search of the car in Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), after it had already been stopped on probable cause and the car was later searched; see also Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed.2d 151 (1938); and United States v. Johns, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985), no warrant required where the vehicle search occurred three days after appellant was arrested and his truck seized for marijuana smuggling at a remote desert airstrip; Florida v. Meyers, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984), no warrant for a second search of a vehicle after it had been impounded for eight hours in a secure impound lot. Michigan v. Thomas, 458

In Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970), the Court held: "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974):

> At least since *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less stringent warrant requirements have been applied to vehicles.

South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d (1976):

> This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are effects and thus within the reach of the Fourth Amendment, warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.

(Internal quotation marks and citations deleted).

Under well established caselaw regarding the forfeiture doctrine, the "thing" itself is deemed the offender. Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801, 2808, 125 L.Ed.2d 488 (1993): "The fiction that 'the thing is primarily considered the offender,' has a venerable history in our case law.", citing to J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376 (1921); United States v. United States Coin and Currency, 401 U.S.

U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750(1982), no warrant for second search extending to opening the air vents under the dashboard of a car whose occupants had been arrested for open container of alcohol, following an original inventory search which uncovered two bags of marijuana in the unlocked glove compartment.

715, 719-720, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971) (property seized under forfeiture is believed to have committed the crime); and The Palmyra, 25 U.S. 1, 12 Wheat. 1, 6 L.Ed. 531 (1827). In the instant circumstances, White's automobile did not cleanse itself of its taint in 68 days. Once probable cause existed for forfeiture, it remained eligible for forfeiture barring some "external event" which could have changed the complexion of the basis to seize.[6]

White used his automobile to sell and deliver cocaine. He was seen by police eyewitnesses on three occasions, and was caught on videotape.[7] White v. State, 680 So.2d 550, 551 (Fla. 1st DCA 1996). White's car thus falls squarely within the proscription of Section 932.702(3), of the Florida Contraband Forfeiture Act[8] making it unlawful to "use any ... motor vehicle ... to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." Upon

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[6] From the date of White's last auto-based dope deal on August 7, 1993 (710 So.2d 949, 950, n.2), until his arrest on other drug charges (680 So.2d 550, 551) on October 14, 1993 (710 So.2d 949, 950), only 68 days had passed.

[7] Apparently, at least one of the videotaped sales was directly out of the car, where appellant handed the drugs out through the window of his car to a person parked next to him. (JA 33).

[8] Sections 932.701-932.707, Florida Statutes (1993). Like the Florida Contraband Forfeiture Act, its federal analogue, 21 U.S.C. Sec. 881 (b)(4), provides for warrantless seizure on probable cause. The forfeiture statute under attack in Calero-Toledo (P.R. Laws Ann., Title 24, Sec. 2512 (Supp. 1973)), was modeled upon the 1970 version of Sec. 881. See Good, 510 U.S. 43, 114 S. Ct. 492, 500, 126 L. Ed. 2d 490 (1993). See Calero-Toledo, at n. 25: "But for unimportant differences, P.R. Laws Ann., Title 24, s. 2512 (a) (Supp. 1973) is modeled after 21 U.S.C. s. 881 (a)." The Florida Supreme Court in Duckman v. State, 478 So. 2d 347, 349, n. 3 (Fla. 1985), similarly concluded the state and federal forfeiture provisions were the same.

that event (using vehicle to sell and deliver cocaine), the personal property (the vehicle), "may be seized at the time of the violation **or subsequent to the violation[.]**" Section 932.703(2)(a), Florida Statutes (1993) (emphasis added).

The failure of police to seize the vehicle immediately without warrant at the time of the sale rather than later under the contraband forfeiture act precipitated the Florida Supreme Court to hold the later warrantless seizure ran afoul of the Fourth Amendment, 710 So.2d 949, 953:

> There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity.

The Court, in Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280, 283-284, 69 L.Ed.2d 543 (1925), stated however,

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

The Florida Supreme Court's "immediacy" requirement, to-wit: the necessity that officers act contemporaneously upon their belief that the vehicle contains contraband[9], or else the

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[9] The search here after seizure, which uncovered the cocaine in the ashtray, was for inventory purposes. (JA 23-24). Such a search is unquestionably valid, South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 3099, 49 L.Ed.2d 1000 (1976), **and its validity is not the subject of inquiry in this case.**

seizure and subsequent search is bad[10], is refuted by Carroll, Cooper, and Calero-Toledo. In Calero-Toledo, police discovered marijuana on board the leased yacht in "early May 1972," 94 S.Ct. at 2082, and seized the vessel pursuant to the forfeiture statute on July 11, 1972. Id. at 2083. In Carroll, the Court found probable cause for federal prohibition agents to search a motor vehicle *sans* warrant on December 15, 1921, some 16 miles away from where it had been seen transporting the participants to a failed liquor sale on September 29, 1921. 267 U.S. at 134-136. Likewise, in Cooper, the Court found a search without warrant of a vehicle that had already been impounded in a garage for a week comported with the Fourth Amendment. 386 U.S. at 58, 62.

In United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 827, 828, 46 L.Ed.2d 598 (1976), the court observed in the context of warrantless arrests of persons, which was based on statutory authority, that:

> Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. *See United States v. Ventresca*, 380 U.S. 102, 106, 85 S.Ct. 741, 744-745, 13 L.Ed.2d 684 (1965); *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512, 12 L.Ed.2d 723 (1964); *Wong Sun v. United States*, 371 U.S. 471, 479-480, 83 S.Ct. 407, 412-413, 9 L.Ed.2d 441 (1963). But we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

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[10] The Florida Supreme Court stated: "Critically, there must be probable cause to believe contraband is in the vehicle at the time of the search and seizure, *Carney*, and there must be some legitimate concern that the automobile 'might be removed and any evidence within it destroyed in the time a warrant could be obtained.' *Lasanta*, 978 F.2d at 1305.", 710 So.2d at 953 (footnote deleted), citing *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), and *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992), respectively, for these propositions.

In Watson, the Court noted that arrest without warrant of a person was the rule at both the state and federal levels since at least colonial times. 96 S.Ct. at 825-826. As the Court has recognized, exigent circumstances as to an automobile can develop virtually instantaneously. See Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 2478-2468, 41 L.Ed.2d 325 (1974) (plurality opinion). There, after the defendant was arrested for murder, the police took his keys and seized his car from a public commercial parking lot a half-block away from the station house. The car was then towed to a police impound lot. The Court found the car validly seized under these circumstances, 94 S.Ct. 2472:

> Respondent contends that here, unlike Chambers probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. **Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest.** Cf. Chambers, id., at 50--51, 90 S.Ct., at 1980--1981. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.

(Emphasis added).

The time frame in which the Court found the automobile seizure without warrant in Cardwell permissible under the Fourth Amendment compares directly with the time frame the

Florida Supreme Court *sub judice* found impermissible. Moreover, to the extent that the rationale of the Florida Supreme Court finds any succor whatsoever in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), that reliance is misplaced.[11] The Court in Cardwell specifically distinguished Coolidge when the seizure of the automobile occurs in a public, commercial parking lot as opposed to a residential driveway, which is precisely the factual situation here, 94 S.Ct. 2464, 2471:

> Respondent asserts that this case is indistinguishable from *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). We do not agree. The present case differs from *Coolidge* both in the scope of the search and in the circumstances of the seizure. Since the Coolidge car was parked on the defendant's driveway, the seizure of that automobile required an entry upon private property. Here, as in *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the automobile was seized from a public place where access was not meaningfully restricted. This is, in fact, the ground upon which the *Coolidge* plurality opinion distinguished *Chambers*, 403 U.S., at 463 n. 20, 91 S.Ct., at 2036. *See also Cady v. Dombrowski*, 413 U.S. 433, 446--447, 93 S.Ct. 2523, 2530--2531, 37 L.Ed.2d 706 (1973).

Nor does the decision of the Florida Supreme Court find any support from any principle of due process applicable to

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[11] "Even though automobiles are afforded lesser Fourth Amendment protection, there is still a strong presumption against warrantless searches and seizures of a citizen's property by the government, absent exigent circumstances. *See Coolidge*, 403 U.S. at 468, 91 S.Ct. at 2039 (reiterating that 'even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.') *Coolidge's* requirement that a 'plain view' seizure must also be 'inadvertent' was overruled in *Horton*, 496 U.S. at 140, 110 S.Ct. at 2310. Minus that incidental reasoning, *Coolidge* remains good law." 710 So.2d 949, 954, n.8.

forfeiture of an automobile. In United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), the Court held that government seizure of real property implicates both the Fourth Amendment and the Due Process Clause of Fifth Amendment. In Good, the Court explored the procedural protections due for seizure of real property and found that a heightened level of procedural protection was due for real property as opposed to mobile property. In so doing, the Court reaffirmed the rationale of Calero-Toledo, 510 U.S. at 52:

> Whether *ex parte* seizures of forfeitable property satisfy the Due Process Clause is a question we last confronted in *Calero-Toledo v. Pearson Yacht Leasing Co.*, supra, which held that the Government could seize a yacht subject to civil forfeiture without affording prior notice or hearing. Central to our analysis in *Calero-Toledo* was the fact that a yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." *Id.*, at 679, 40 L Ed 2d 452, 94 S Ct 2080. The ease with which an owner could frustrate the Government's interests in the forfeitable property created a "'special need for very prompt action'" that justified the postponement of notice and hearing until after the seizure.

(Citations deleted).

Calero-Toledo provides a rational, working analysis from which to draw for any automobile seizure under forfeiture. As such, no credible contention can be asserted that the seizure here would be impermissible under Calero-Toledo. The Court in Good noted the three part test of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 218 (1976), "provides guidance" in the forfeiture and seizure area. 510 U.S. at 53. Noting that this test was applied in Good in the context of forfeiture of real property, which the Court found to have heightened procedural protection over movable property, it also provides succor in this case involving highly mobile property, 510 U.S. 53:

> The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose.

(Citations deleted).

Applying those factors *in seriatim* to the instant action shows that the antecedent warrant requirement added onto the Fourth Amendment where probable cause exists to seize a vehicle is not constitutionally mandated.[12]

Private interest affected by the official action.

The private interest affected here is temporary deprivation of one's automobile. Chapter 932.703(2)(a) of the Florida Contraband Forfeiture Act provides for notice at the time of seizure, or by return receipt certified mail, of the right to an adversarial preliminary hearing after the seizure to determine probable cause whether the property has been, or is being used to violate the act.[13]

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[12] Indeed, the notion that some "protection" will accrue is highly suspect at best. The best constitutional protection is the expeditious testing before a magistrate of the circumstances derived from the seizure.

[13] The same section of the act directs the seizing agency to make diligent efforts to notify the person affected, in any case within five working days after the seizure, if done by certified mail. The notice must state that the person entitled to notice may request an adversarial preliminary hearing within 15 days after receipt of the notice. Such hearing, if requested, must be held within 10 days after the request, or as soon thereafter as is practicable. The Act provides additional procedural protections for the persons with an interest in

A person aggrieved by seizure and potential forfeiture of his car can have the issue judicially resolved in a prompt and timely fashion.[14] It is of further note that such deprivation of the automobile can well be temporary. Section 932.703(2)(c) of the Act provides that at the hearing, if the court concludes there was probable cause for the seizure, the court shall authorize seizure or continued seizure of the property. *A fortiori*, if insufficient probable cause is established at the post-seizure adversarial preliminary hearing, the property is to be returned to the owner. Such post-seizure judicial determination is constitutional. Calero-Toledo. It protects the interests of both the owner of the seized property and society. The owner of the property has the propriety of the seizure upon probable cause judicially examined within days. Such minimal deprivation upon an owner is outweighed by the interest of society, which is furthered by enabling quick, flexible action by law enforcement to get conveyances furthering the drug trade out of

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the affected property, noting that replevin may be sought to recover the property if forfeiture proceedings are not initiated within 45 days after the seizure. The court can extend the 45 days to initiate seizure proceedings to 60 days upon good cause. Chapter 932.703(3), Florida Statutes (1993). Other protections afforded by the act include affirmative defenses for an "innocent owner," §§ (6)(a); bonafide lienholder, §§ (6)(b); ownership interest of a joint husband and wife, §§ (6)(c); car rental company, §§ (6)(d); and innocent co-owner, §§ (7).

[14] Florida courts have strictly enforced the time limit provisions against the government. See State Department of Highway and Safety and Motor Vehicles v. Metiver, 684 So.2d 204 (Fla. 4th DCA 1996), affirming trial court's dismissal of forfeiture action and order requiring return of seized cash to person from whom it was seized due to a 5 day delay in setting the hearing. In the White case, White has never claimed any lack of notice, nor challenged the adequacy of post seizure hearings, or asserted a due process claim.

circulation.[15] Also, if there is no innocent owner defense to forfeiture itself, Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), the guilty owner here cannot complain that the judicial determination of forfeiture is held later rather than sooner.

Risk of erroneous deprivation through current procedures and probable value of additional safeguards.

White's vehicle could only be validly seized upon probable cause that it had been, or was being used, in violation of the Florida Contraband Forfeiture Act. Section 932.703 (2)(c), Florida Statutes (1993).[16] White was utilizing his vehicle to sell and deliver cocaine, thus making his vehicle eligible for forfeiture. The crux of the Florida Supreme Court's quarrel is that the probable cause for forfeiture determination was made and acted upon by law enforcement without intervening review by a magistrate.

All persons who have their car seized on probable cause to believe the vehicle is being used to violate the Florida Contraband Forfeiture Act are entitled to post seizure hearing.[17] The Florida Contraband Forfeiture Act provides a

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[15] Note in Indialantic Police Dept. v. Zimmerman, 677 So.2d 1307 (Fla. 5th DCA 1996), where the seizing agency appealed the determination that there was no probable cause for the initial vehicle stop and thus the vehicle must be handed back to the owner. The appellate court reversed the lower court's determination that there was no probable cause for the stop and subsequent search.

[16] An examination of the federal forfeiture statute, 21 U.S.C. Sec. 881, interpreted in Valdes, to require no pre-seizure warrant and the statute under scrutiny are analytically indistinguishable to the issue presented.

[17] At such hearing, the court shall review the verified affidavit, any supporting documents, and take any testimony to determine whether there is probable cause the property was used, is

person aggrieved by a seizure of an automobile: notice, opportunity for hearing to contest the seizure, and determination of probable cause for the seizure by a neutral magistrate.

The Constitution neither commands, nor logically countenances more than provided under the forfeiture laws. Moreover, significant and important governmental interests underlying forfeiture of conveyances to curtail the drug trade are strong:

> Forfeiture of conveyances that have been used--and may be used again--in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.

Calero-Toledo, 416 U.S. 663, 94 S.Ct. 2080, 2094, 40 L.Ed.2d 543 (1974). And, as further noted in Calero-Toledo, 94 S.Ct. at 2090:

> preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized--as here, a yacht--will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.

From a due process perspective, the Court has recognized that "the overarching factor is the length of the delay" between seizure and a hearing to contest the seizure. U.S. v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency, 461 U.S. 555, 103 S.Ct. 2005, 2012, 76 L.Ed.2d 143 (1983). The Court indicated the key to this inquiry is

> whether the claimant has been prejudiced by the delay. The primary inquiry here is whether the delay has

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being used, was attempted to be used, or was intended to be used to violate the act. Section 932.703 (c), Florida Statutes (1993).

> hampered the claimant in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence. Such prejudice could be a weighty factor indicating that the delay was unreasonable.

In White's case, there is no plausible claim that he was adversely impacted in his ability to put on a defense to the forfeiture at a hearing under the forfeiture act.

The State's Interest, and the Additional Administrative Burden the Added Procedural Requirement Imposes.

The additional administrative burden laid upon every seizure by the Florida Supreme Court in interpreting the application of the Fourth Amendment is incalculable. See United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989), (Eleventh Circuit decided this same question contrary to the Florida Supreme Court.)[18] Setting such an arbitrary roadblock in the path of effective police investigation is unwarranted. The added procedural burden imposed by the Florida Supreme Court is thus seen to be improper under the third prong of the test.[19]

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[18] Such result should not be countenanced in this case under any principle of federalism. Under Art I, §12 of the Florida Constitution, Fourth Amendment issues in the Florida courts must be decided in conformity with decisions of the Court, and the Florida courts can afford no higher level of Fourth Amendment protection, Bernie v. State, 524 So.2d 988, 990-991 (Fla. 1988). See White, 710 So.2d 949, 950, n.3. Thus, by operation of the Florida Constitution, there is no federalism issue because there is no independent state law basis to support the decision of the Florida Supreme Court. The issue is thus governed solely by the Fourth Amendment as interpreted by the Court.

[19] A case illustrating this potential state-federal effort is In re Forfeiture of Ten Thousand Seven Hundred Eighty-eight Dollars ($10,788.00) in U.S. Currency, 580 So.2d 855 (Fla. 2d DCA 1991),

In U.S. v. Valdes, 876 F.2d 1554, 1559-1560 (11th Cir.1989), the court opined:

> A seizure of property under section 881(b)(4) is essentially the same as the arrest of a person. In both cases, the object seized is believed to have committed a crime. *See United States v. United States Coin and Currency*, 401 U.S. 715, 719-20, 91 S.Ct. 1041, 1044, 28 L.Ed.2d 434 (1971) (forfeit property has traditionally been viewed as being guilty of wrongdoing). In both cases, the police must possess articulable facts to support such belief before they can take the object into custody. Moreover, if the owner of property seized under section 881(b)(4) believes that his property was seized without probable cause, the law provides him remedies essentially the same as those provided arrestees. The owner can challenge the seizure before a neutral magistrate; if the magistrate decides in his favor, the property will be released. If the officers responsible for seizing the property erred, they may be held accountable in much the same fashion as officers who make an illegal arrest. They may have to respond to the property owner in money damages, and they may be disciplined. Lastly, the "fruit of the poisonous tree" doctrine may render inadmissable evidence obtained as a result of the unlawful seizure. *See Segura v. United States*, 468 U.S. 796, 804-08, 104 S.Ct. 3380, 3385-87, 82 L.Ed.2d 599 (1984).
>
> If federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs. Appellants would have us accord the trafficker's property interest greater deference than his

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where the Florida Department of Law Enforcement (FDLE) sought forfeiture in a state court proceeding of cash from a loansharking business.

> liberty interest; they seem to suggest that the injury caused by erroneous detention (i.e. the period of time between seizure, or arrest, and the magistrate's ruling ending the detention) is somehow greater in the case of one's property than it is in the case of one's liberty. We are not persuaded. We therefore hold that the warrantless seizures of appellants' automobiles, and the subsequent inventory searches, were not unreasonable under the fourth amendment.

(Footnotes deleted).

In rejecting the majority view, the Florida Supreme Court observed,[20] 710 So.2d 949, 954:

> Finally, the reasoning of the district court majority, that since a defendant's person can be seized without a warrant his property should be no different, simply proves too much. If we were to follow that reasoning to its logical conclusion we would, in essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property. It will always be more intrusive to seize a person than it will be to seize his property. That is the nature of human values. However, such an approach would apparently have us do away with the constitutional law of search and seizure as to property entirely, simply because we have permitted the warrantless arrest of a person.

(Footnote deleted).

In adopting the minority view[21] of United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), the Florida Supreme Court not only rejected controlling authority of this circuit, but more importantly elected to expand Fourth Amendment rights beyond that which is required.[22] In Lasanta, the Second Circuit

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[20] The Florida Supreme Court decision is also contrary to a majority of state courts which have addressed this issue under federal, as opposed to a state constitutional grounds. In Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820, 232 Ga. 671, 208 S.E. 2d 483 (Ga. 1974), the Georgia Supreme Court permitted warrantless seizure and subsequent forfeiture of liquor kept at a social club in a "dry" county. Relying upon Calero-Toledo, the court found that opportunity for post-seizure hearing to contest the validity of the seizure was "sufficient process of law under the Federal Constitution[.]" 208 S.E. 2d at 485. In State v. Brickhouse, 20 Kan. App. 2d 495, 890 P. 2d 353 (Kan. App. 1995), the Kansas court upheld warrantless seizure, search and forfeiture of an automobile under a state forfeiture act because police officers had probable cause to believe the car was being used to violate state drug laws. Relying on Cooper and Valdes, and rejecting Lasanta the Kansas court stated it found the majority view persuasive and held the warrantless seizure and subsequent search of the car under the state forfeiture act based on probable cause, not to violate the Fourth Amendment. In State v. Gwinner, 59 Wash. App. 119, 796 P. 2d 728 (Wash. App. 1990), review denied, 117 Wash. 2d 1004, 814 P. 2d 266 (1991), a state officer provided a tip to federal officers which ultimately led the DEA agents to seize and search a truck without a warrant pursuant to Sec. 881 (b)(4). The state court in considering the validity of search, found the challenge to the seizure did not violate the Fourth Amendment under the federal law. The state court recognized that although valid under the Fourth Amendment, it might be invalid under the state constitution, however, the federal officers were to be judged under federal, not state law.

[21] Only two state courts have reached a result akin to that of the Florida Supreme Court: Davis v. State, 813 P. 2d 1178, 1182-1183. (Utah 1991); Application of Harnuschfeger, 158 Misc. 2d 299, 600 NYS 2d 894 (Supp. 1993).

[22] The Florida Supreme Court has recently reached out once again to adopt a minority view of Fourth Amendment search and seizure jurisprudence. In J.L. v. State, Case No. 90,361 (Fla. December 17, 1998), the state court refused to adopt a firearms exception to the general rule that corroboration of only innocent details in an anonymous tip does not provide police officers with

acknowledged that language found in 21 U.S.C. Sec. 881 (b)(4) supported a warrantless seizure of Cardona's vehicle, and noted that the "attorney general claims to have had probable cause to believe Cardona's vehicle was used 'to transport, or ... to facilitate the transportation, sale, receipt, possession, or concealment of' controlled substances. 21 U.S.C. Sec. 881 (a)." Lasanta, 978 F. 2d at 1304. The court however, characterized the government's actions as erroneous and contrary to the fourth amendment opining:

> The government disclaims the need to justify its warrantless seizure of Cardona's limousine with any of the traditional exceptions to the fourth amendment. It contends that the plain language of the civil forfeiture statute absolves it of any responsibility to obtain a warrant in executing seizures of property used in connection with controlled-substance transactions. The government argues that the forfeiture statute represents congress's decision to create a new exception to the Fourth Amendment's warrant requirement. In essence, it argues that congress has amended the constitution. To state the position is to refute it, because congress cannot authorize by legislation what the constitution forbids....

978 F. 2d at 1304.

The court fashioned the government's argument as being, the civil forfeiture statute

> represents congress's considered exemption of the executive branch from the strictures of the fourth amendment; and that the war on drugs justifies a ruling that courts deem warrantless seizures constitutionally adequate **even when they are grounded solely on the attorney general's affirmation that probable cause existed to believe the property was used in connection with the facilitation of transactions in narcotics,** see 21 U.S.C. Sec. 881 (b)(4).

978 F. 2d at 1304-1305 (emphasis added). The court rejected "out of hand the government's argument" holding that "it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon (the war on drugs) were to leave the constitution itself a casualty." 978 F. 2d at 1305.[23]

This minority view starts off on the wrong footing; it creates a procedural step of requiring a warrant before seizure under a forfeiture statute where no such requirement exists. It erects arbitrary roadblocks in the path of effective law enforcement and transforms a judicial **preference** for a warrant, Watson, supra, into a newly found constitutional imperative, in an effort to prevent the government's "relentless and imaginative use of that weapon" in the war on drugs.[24]

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reasonable suspicion of criminal activity. In so doing, as pointed out by the dissent, the court adopted a holding "contrary to the view of the overwhelming majority of jurisdictions that have considered the issue."

[23] It should be noted that in spite of these harsh and dire pronouncements, the court found "any constitutional upheaval" to be harmless error and affirmed Cardona's conviction.

[24] Representative of this is Ala. Code §20-2-93(b)(4), which provides that "Seizure without process may be made if: (4) the state, county, or municipal law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter." Similar provisions are to be found in Ark. Code Ann. §5-64-505(b)(4); Cal. Health & Safety Code §11471(d); Col. Rev. Stat. Ann. §16-13-504(1); Del. Code Ann. Title 16 §4784(c)(4); Ga. Code Ann. §16-13-49(g)(2); Haw. Rev. Stat. Ann. Ch. 712A-6.(1)(c)(iv); Idaho Code §37-2744(b)(4); Kan Stat. Ann. §60-4107(b); Ky. Rev. Stat. Ann. §218A.415(1)(d); Me. Rev. Stat. Ann. Title 15 §5826.D.; Md. Ann. Code Art. 27, §297(d)(iv); Mich. Stat. Ann. Title 14 §14.15 (7522)(d); Miss. Code Ann. §41-29-153(b)(4); Mont. Code Ann. §44-12-103(1); Neb. Rev. Stat. §28-431(1)(f); N.H. Rev. Stat. §318-B: 17-b-I-b(b); N.M. Stat. Ann. §30-31-35.B.(4); Nev. Rev. Stat. Ann. §179.1165.2(d); N.D. Cent.

Additionally, the settled doctrine of seizure of an automobile without warrant does not "amend the Fourth Amendment out of the Constitution[.]" Application of the doctrine to White's automobile, for example, does nothing more than apply the limited automobile exception to the warrant requirement of the Fourth Amendment to an automobile. The Florida Supreme Court and the minority view, in fact, do "away with the constitutional law of search and seizure as to property entirely," since no warrant is required for the seizure and subsequent search of an automobile on probable cause.[25]

Beyond peradventure, the majority view requiring no preseizure warrant for seizure of instrumentalities under forfeiture statutes satisfies all requirements under the Fourth Amendment.

Code §19-03.1-36.2.d.; Okla. Stat. Title 63, §2-504.4; 42 Pa. C.S.A. §6801(b)(4); R.I. Gen. Laws §21-28-5.04.2(c)(3)(D); S.C. Code Ann. §44-53-520(b)(4); S.D. Codified Laws §34-20B-75.(4); Tenn. Code Ann. §53-11-451(b)(4); V.I. Code Ann. Title 19, §623(b)(4); Wash. Rev. Code Ann. §69.50.505(b)(4); Wis. Stat. Ann. §961.55(2)(d); Wyo. Stat. Ann. §35-7-1049(b)(iii).

[25] "The exception recognized in *Carroll* is unquestionably one that is 'specifically established and well delineated.'" U.S. v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982).

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits that the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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No. 98-223

In The

Supreme Court of the United States

October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the warrantless seizure of Respondent's automobile pursuant to the Florida Contraband Forfeiture Act without a warrant and based upon statutorily mandated probable cause violated the Fourth Amendment of the United States Constitution. [Restated].

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, §12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. This right shall be construed in conformity with the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

While Respondent essentially accepts Petitioner's Statement of the Case, the following facts are added or clarified:

1. All four doors of Respondent's 1983 Toyota automobile were locked when it was parked in the parking lot of his employer at the time of seizure. (JA-28-29; trial record (hereinafter "TR") at 22).

2. The inventory search that resulted because of the seizure of the vehicle occurred at the task force building, and no search, cursory or otherwise, occurred at the parking lot or en route as the car was driven to the task force building. (TR 21-22).

3. The two pieces of crack cocaine which resulted in the prosecution of this case were found wrapped inside a paper towel which was itself inside a paper bag which was in the ashtray of the car. (TR 17-18).

4. State's exhibit 2, a Florida vehicle registration certificate on a 1983 Toyota four-door car registered to Respondent, was admitted into evidence at the trial. (TR 18; 32-33).

5. The Florida Supreme Court in its opinion noted that it is "conceded that the government had no probable cause to believe that contraband was present in [Respondent's] car. . . . " (A 72; *White v. State*, 710 So.2d 949, 953 (Fla. 1998)).

6. Between the time in which alleged drug activities occurred in Respondent's car and the seizure of Respondent's car, 68 to 80 days passed.[1] (The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993; Respondent's car was seized at his place of employment on October 14, 1993.) (A 65; *White* at 950).

7. The seizure of Respondent's car was preceded by this conversation between the officers: [Officer Squire testifying] "[Officer] Pierce told me that he intended to seize [Respondent's] vehicle for forfeiture and he asked me to go along to bring the vehicle back." [A 23].

SUMMARY OF THE ARGUMENT

Essentially, the validity of law enforcement's seizure of Respondent's automobile is predicated upon an asserted analogy to the warrantless arrest of a person, the so-called plain view exception to the warrant requirement, and the so-called automobile exception to the warrant requirement.

The warrantless arrest of a person is not constitutional in all instances and has been limited by this Court's decisions. Moreover, arrests of persons are distinguishable from seizures of property for forfeiture, and procedural safeguards are afforded people who are arrested

[1] Actually, from the earliest date (July 26, 1993) to the date of seizure was 80 days, with the next earliest date (August 4, 1993) to the date of seizure 71 days. The range of days in which law enforcement could have gotten a warrant is thus 68 days (least) to 80 days (most).

which are not afforded property seized under the Florida Contraband Forfeiture Act.

The plain view exception is simply inapplicable here. Historically, this exception was applicable only to contraband *per se* or to evidence of a crime. The so-called "contraband" involved here is "derivative" contraband, not contraband *per se*. There was no contention below that the car which was seized from Respondent was to be used as evidence, and indeed it was not used as evidence at Respondent's trial.

Additionally, a seizure leads to a search as night follows day. The Fourth Amendment protects against unreasonable warrantless seizures, as well as searches.

The only probable cause available here is the statutorily provided derivative probable cause, and it arises only by virtue of the object's association with *per se* contraband. Petitioner's interpretation of the statute impermissibly allows a law enforcement agent in the field first to determine that contraband has been used in the seized vehicle, and then to determine at any time that the vehicle is subject to seizure. Judicial oversight is missing, and this violates the Fourth Amendment's prohibition against unreasonable warrantless seizures.

Additionally, the statute raises to an absolute the imprimatur of the derived contraband. Absolute *per se* rules are disfavored in Fourth Amendment analysis.

Because there is no judicial oversight over the determination by the field agent to seize the vehicle, and because forfeitures are punitive in nature, the warrantless

seizure of Respondent's automobile in this case was unreasonable.

Last, but not least, the automobile exception was inapplicable. The Petitioner conceded below that it had no probable cause to believe that contraband was presently in Respondent's automobile, and that exigent circumstances did not exist. After all, 68 to 80 days elapsed between the time in which the alleged illegal activities occurred in the car and the time in which the car was seized: 68 to 80 days in which law enforcement could have obtained a warrant but did not bother to do so. This is constitutionally impermissible.

ARGUMENT

ISSUE

WHETHER THE WARRANTLESS SEIZURE OF RESPONDENT'S AUTOMOBILE PURSUANT TO THE FLORIDA CONTRABAND FORFEITURE ACT WITHOUT A WARRANT AND BASED UPON STATUTORILY MANDATED PROBABLE CAUSE VIOLATED THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION. [RESTATED].

Pursuant to the Florida Contraband Forfeiture Act, Florida Statute Sections 932.701 *et seq.*, Respondent was arrested at his place of employment, and his vehicle seized from the parking lot 68 to 80 days after prior alleged drug activity took place in it. At the time of the seizure, law enforcement authorities had no reason to believe that contraband was to be found in his car. So-called probable cause to seize the car was provided by virtue of Respondent's alleged earlier illegal activity in

the car and Section 932.703(1)(a), Florida Statutes, which provides that any motor vehicle which is used to transport, conceal, or possess contraband articles "may be seized and shall be forfeited" subject to its provisions.

The Florida Supreme Court in the opinion below found that the warrantless seizure of Respondent's automobile without probable cause[2] and exigent circumstances violated the Fourth Amendment's prohibition against unreasonable warrantless seizures.

In so holding, the Florida Supreme Court found that none of the traditional exceptions to the warrant requirement argued below were applicable, that the Fourth Amendment requires that absent exigent circumstances, law enforcement must secure a warrant for the search and seizure of an automobile, and that no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.

Respondent's position (simply) is that unless this Court wishes to knock another hole in the Fourth Amendment, none of the traditional exceptions to the Fourth Amendment's prohibition of unreasonable warrantless seizures apply, and that law enforcement had neither "traditional" probable cause nor exigent circumstances in which to seize Respondent's 1983 Toyota car.[3]

Petitioner, the Solicitor General of the United States, and the various Attorneys General of 27 listed states have

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[2] Except for the derivative "probable cause" provided by the statute.

[3] "An ill-favoured thing, sir, but mine own." Shakespeare, *As You Like It* (1599-1600), 5.4.60.

filed, respectively, a merits brief and amicus curiae briefs. Arguments from each will be responded to separately.

PETITIONER STATE OF FLORIDA'S ARGUMENTS REFUTED

Initially, the question presented to this Court in its petition for writ of certiorari was:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A WARRANT IS REQUIRED BY THE FOURTH AMENDMENT TO SEIZE A MOTOR VEHICLE UNDER A CONTRABAND FORFEITURE ACT AND FOR SUBSEQUENT SEARCH OF SAID VEHICLE CONFLICTS WITH DECISIONS OF THE COURT IN *CARROLL V. UNITED STATES, CALERO-TOLEDO V. PEARSON YACHT LEASING*, AND *COOPER V. CALIFORNIA*, THAT OF THE ELEVENTH CIRCUIT IN *UNITED STATES V. VALDES* AND THE MAJORITY OF STATE COURTS ADDRESSING THIS ISSUE?

Subsequently, in its merits brief, the Petitioner has transmogrified this issue to:

> WHETHER THE FOURTH AMENDMENT REQUIRES AN ANTECEDENT WARRANT FOR SEIZURE OF A MOTOR VEHICLE UPON PROBABLE CAUSE UNDER A CONTRABAND FORFEITURE ACT (RESTATED).[4]

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[4] Rule 24.1.(a), of the rules of this Court apparently allows the rephrasing of the issue without raising additional questions or changing the substance of the question already presented.

Because this Court accepted jurisdiction based on the original question, Respondent will briefly dispatch it.

In *Carroll, et al. v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), this Court concluded that the government had probable cause to believe that contraband was presently being transported and that because of exigent circumstances created by the mobility of a vehicle, immediate seizure was permissible. The "probable cause" involved in *Carroll* was not probable cause that the vehicle was subject to forfeiture, but probable cause that at the time of the seizure the vehicle carried contraband goods (prohibited alcohol).

As this Court noted in *Carroll*, the " . . . main purpose of the act (involved in *Carroll*) obviously was to deal with the liquor and its transportation, and to destroy it." 267 U.S. at 154. This court concluded in *Carroll* that probable cause existed to believe " . . . that intoxicating liquor *was being* transported in the automobile which" the agents stopped and searched. (Emphasis added; 267 U.S. at 162).

It is clear from the context of *Carroll* that the probable cause involved was probable cause to believe that contraband was presently being transported by the vehicle. In that light, this Court went on to caution that otherwise warrantless seizures were disfavored:

> In cases where the securing of warrant is reasonably practicable, *it must be used* and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

> *United States v. Kaplan*, (D.C.), 286 F.963, 972. [*Carroll* at 267 U.S. 156; emphasis added].

Clearly, *Carroll* does not support the Petitioner's contention that the Florida Supreme Court's opinion conflicts with the decisions of this court.

This Court's holding in *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), likewise in no way conflicts with the holding of the Florida Supreme Court's decision in this case. In *Calero-Toledo*, this Court specifically noted in footnote 14 that: "We have no occasion to address the question whether the Fourth Amendment warrant or probable-cause requirements are applicable to seizures under the Puerto Rican statutes." 416 U.S. at 679, 40 L.Ed.2d at 466.

Calero-Toledo v. Pearson Yacht Leasing Company was decided under federal constitutional due process requirements, not Fourth Amendment requirements.[5] Moreover, the aggrieved party sought an *adversarial* pre-seizure hearing, not merely a pre-seizure *ex parte* review by a magistrate.

Finally, the Florida Supreme Court's decision does not conflict with *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). In *Cooper*, although this Court upheld an inventory search of a car which had been seized pursuant to a California forfeiture statute, the

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[5] Activities by law enforcement may offend one amendment of the Constitution but not another. *See Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488, n.4 (1993). *See also United States v. James Daniel Good Real Property, et al.*, 510 U.S. 43, 49-50, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

legality of the seizure (as opposed to the search) was never at issue.

In *United States v. Valdes*, 876 F.2d 1554 (11th Cir. 1989), pursuant to Title 21 United States Code Section 881(b)(4), the automobiles were seized because the agents had probable cause to believe that they were subject to forfeiture by virtue of their use in (prior) drug transactions. The Eleventh Circuit admitted (footnote 7 at 1557) that the seizures of the automobiles could not be sustained under any of the exceptions to the Fourth Amendment warrant requirement.

Nonetheless, the Eleventh Circuit upheld the seizures based upon *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) on the theory that under appropriate circumstances a person could be arrested without a warrant, the cost to the police in *Watson* was too great to society to obtain a warrant, and if people could be arrested without a warrant it would be anomalous " . . . [to] accord the trafficker's property interest [footnote omitted] greater deference than his liberty interest. . . . " *Id.* at 876 F.2d 1560.

This brings us to the gravamen of Petitioner's main complaint in its merits brief, i.e., why if people may be arrested under certain circumstances without a warrant should their property not be arrested without a warrant pursuant to the "strictures" of the Florida Contraband Forfeiture Act?

The first answer to that question is that people cannot always be arrested without a warrant. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 13 L.Ed.2d 639 (1980) [arrest warrant required to enter the suspect's dwelling

when there is reason to believe that he is within]. Moreover, even an arrest warrant of a person has limitations: *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) [arrest warrant does not authorize entry into the home of a third party to look for the suspect absent exigent circumstances] and *United States v. Watson, supra* [warrantless arrest for a felony based on probable cause may be made in a public place without exigent circumstance but a warrant is preferred].

Next, it should be noted that an arrested person has rights that the seized property pursuant to the Florida Contraband Forfeiture Act does not have. For instance, a person is entitled to a first appearance within 48 hours with the burden on the government to prove probable cause for his arrest and continued detention. *See*, for example, *Riverside County, California v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) and *Powell v. Nevada*, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994).[6]

Furthermore, the arrest of a person without a warrant (as opposed to the seizure of property) is bottomed, in part at least, on the *public safety*. *See Watson* at 423 U.S. 419-420, relying on language from *Rohane v. Swain*, 59 Mass. 281, 284-285 (1850). ("The public safety, and due apprehension of criminals, charged with heinous offenses, imperiously require that such arrests should be made without warrant by officers of the law.")

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[6] In the state of Florida, for instance, every arrested person is entitled to a prompt first appearance before a judicial officer within 24 hours of arrest. Florida Rule of Criminal Procedure 3.130.

Of course, the protections of the Fourth Amendment are not limited to persons:

> The right of the people to be secure in their persons, houses, papers, and *effects*, against *unreasonable searches and seizures*, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or *things* to be *seized*. [Emphasis added].

The Florida Supreme Court observed that the limit to protections of the Fourth Amendment to seizures of only persons would undermine its effectiveness:

> The United States Supreme Court has purposely subjected the Fourth Amendment to only a "few well-delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). For example, the courts have carefully restricted the law of search and seizure to permit a limited search of an arrestee and his person "incident" to a valid arrest. *See, Chimel v. California*, 395 U.S. 752 (1969). However, the reasoning of the district court majority, if carried to its logical bounds, would do away with the limitations established to a search incident to a lawful arrest and now permit a search of anything, anywhere, based upon probable cause, without a warrant, since those actions involving property would obviously be less intrusive than seizing the person. Obviously, we are not willing to accept such a proposition and its implication. [Footnote omitted; A 75; *White* at 954].

Perhaps the overarching theme of Petitioner's argument is that if this Court requires a warrant under the

circumstances presented, law enforcement will be hampered by " . . . an inflexible procedural barrier in the path of effective law enforcement. . . . " (Petitioner's brief at 5).

First, the Fourth Amendment does not exist to promote "safe," "effective," or "imaginative" law enforcement. It exists to protect the *people* from unreasonable warrantless searches and seizures.

As Justice Marshall wrote, with Justices Blackmun and Stephens joining, in the dissent of *Florida v. Bostick*, 501 U.S. 429, 440, 111 S.Ct. 2382, 115 L.Ed.2d 389, 402 (1991) with the apparent approval of the majority at 501 U.S. 439:

> Our Nation, we are told, is engaged in a "war on drugs." No one disputes that it is the job of law-enforcement officials to devise effective weapons for fighting this war. But the effectiveness of a law enforcement technique is not proof of its constitutionality. The general warrant, for example, was certainly an effective means of law enforcement. Yet it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion *notwithstanding* the effectiveness of this method. *See Boyd v. United States*, 116 U.S. 616, 625-630, 29 L.Ed.2d 746, 6 S.Ct. 524 (1886). *See also, Harris v. United States*, 331 U.S. 145, 171, 91 L.Ed. 1399, 67 S.Ct. 1098 (1947).

Finally, Petitioner argues that the "innocent owner" provisions of the statute are adequate safeguards. They are not, because the burden is on the innocent owner to assert them. More importantly, they are *not* parts of the

constitution and may be removed at any time by the legislature and/or Congress.

THE SOLICITOR GENERAL OF THE UNITED STATES' ARGUMENTS REFUTED

Amicus Curiae Solicitor General of the United States presents a syllogistic[7] argument which is presented here for the first time as it was not presented to the courts below. However, this argument does appear to have been broached in *United States v. Dixon*, 1 F.3d 1080 (10th Cir. 1993).

The Solicitor General's syllogism goes something like this: warrantless seizures based upon probable cause have been upheld so long as the seizure was effected in a manner that does not intrude on privacy interests; the seizure at issue in this case satisfies the requirements laid out in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) [inadvertence is not required for seizure under the plain view doctrine]; the absence of exigent circumstances did not invalidate the seizure of Respondent's 1983 Toyota; just so long as the police had probable cause to believe that Respondent's vehicle had previously been used to facilitate narcotics trafficking the seizure of the automobile was valid; and once seized, the inventory search of Respondent's automobile allowed

[7] "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver Wendell Holmes, Jr., (1841-1935), *The Common Law* [1881].

introduction of the evidence found during the search to be admitted properly at Respondent's trial.

The substance of the Solicitor General's argument is simply that "seizures" are different than "searches," in that they only involve "possession" and not "privacy" rights; that the "plain view" exception to the warrant requirement applies because under the appropriate forfeiture statute probable cause existed to believe that Respondent's automobile had been used to transport drugs or to sell drugs out of it, that the officers were in a public place and "recognized" the automobile as contraband, and that under the plain view doctrine they had every right to seize it. Once they seized it, pursuant to the "inventory" rationale, they had every right to search it and the fruits of that search were admissible into evidence.

Simply put, the response to the Solicitor General's arguments is that "seizures" are protected every bit as much as "searches" under the Fourth Amendment, the plain view exception is inapplicable, and the Florida Contraband Forfeiture Act violates the requirements of the Fourth Amendment against unreasonable warrantless seizures.

SEIZURES UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects against unreasonable "searches" *and* "seizures." The parallel conjunctive term "and" does not imply that searches are constitutionally more important or more protected than seizures; its very use implies their equivalence.

Moreover, phrases such as "possession is nine tenths of the law" and "finders keepers, losers weepers" are an expression by the common man that loss of possession of an item implies loss of all rights (in a practical sense) regardless of judicial niceties.[8]

Once law enforcement has seized a vehicle, as night follows day, law enforcement will conduct an inventory search of it. *United States v. Pappas*, 613 F.2d 324, 331 n.10 (1st Cir. 1979) ("In forfeiture cases the protective function of an inventory search is particularly important since the vehicle may be retained in possession of the government for months before forfeiture proceedings are instituted.").

Thus, a "seizure" inevitably implicates privacy rights[9] as well as possessory interests. Of course, a

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[8] "The life of the law has not been logic; it has been experience." Holmes, *The Common Law* [1881]. *See, One 1958 Plymouth Sedan v. Com. of Pennsylvania*, 380 U.S. 693, 701, 14 L.Ed.2d 170, 175, fn.11 (1965), stating that in *Boyd v. United States*, 116 U.S. 616 (1886) the Court had "rejected any argument that the technical character of a forfeiture as an in rem proceeding against the goods had any effect on the right of the owner of the goods to assert as a defense violations of his constitutional rights". Further, in *Plymouth*, at 701 fn.11, the Court quoted approvingly this passage from *Boyd*, (at 638), that "although the owner of goods, sought to be forfeited by a proceeding in rem, is not the nominal party, he is, nevertheless, the substantial party to the suit. . . ."

[9] *See Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387, 401, n.12 (1978) which in pertinent part states: "One of the main rights attaching to property is the right to exclude others, *see* W. Blackstone, *Commentaries*, Book 2, Ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."

seizure which only implicates "possessory" rights may also constitute a warrantless unreasonable seizure under the Fourth Amendment. *See Soldal et ux. v. Cook County, Illinois et al.*, 506 U.S. 56, 68, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) ("But our cases are to the contrary and hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the amendment has taken place.")

Thus, the attempt by the Solicitor General to parse the Fourth Amendment's protection of searches versus seizures is meaningless and trivializes the significant protections afforded by that amendment. Ultimately, the seizure, which may be and usually is more disruptive than the search, will result in a search, and loss of privacy rights. Indeed, *Cooper v. California, supra*, is such an example, as is this case (where the seizure led directly to the search of Respondent's automobile).

PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT IS INAPPLICABLE TO THIS CASE

The crux of the plain view exception is that officers are in a place where they have a right to be (either by operation of a warrant or by virtue of being in a public place) where they come across "contraband" (items *per se* illegal) or evidence of a crime. The plain view exception was never developed nor intended to be applied in a "forfeiture" case where the "probable cause" to believe that the item seized is artificially supplied by a statute as

opposed to contraband *per se* or evidence of a crime.[10] In *United States v. Place*, 462 U.S. 696, 701, 702, 103 S.Ct. 263, 77 L.Ed.2d 110 (1983), this Court stated:

> In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. [Footnote omitted] See, e.g., Marron v. United States, 275 US 192, 196, 72 L Ed 231, 48 S Ct 74 (1927). Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present. See, e.g.,

[10] To date, there has been no contention whatsoever that the car itself was "evidence" of a crime. It was not introduced into evidence at Respondent's trial, although the vehicle registration certificate was introduced into evidence. However, the latter is a public document. At any rate, the car was not "seized" as evidence of a crime; it was "seized" because of the provision in the Florida Contraband Forfeiture Act which made it "derivative" contraband by virtue of having contraband possessed in it or contraband sold out of it. Moreover, when an officer seizes evidence of a crime in plain view, his agency doesn't stand to gain monetarily as it does when an officer seizes derivative contraband and gets the proceeds from its sale. *See* note 13, *infra* and *Austin* at 509 U.S. 620, 125 L.Ed.2d 504. *See*, also, *United States v. Good Real Property*, 510 U.S. at 43, 56, fn.2 and *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

> Arkansas v. Sanders, 442 US 753, 761, 61 L Ed 2d 235, 99 S Ct 2586 (1979); United States v Chadwick, 433 US 1, 53 L Ed 2d 538, 97 S Ct 2476 (1977); Coolidge v. New Hampshire, 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971). [Footnote omitted] For example, "objects such as weapons or contraband found in a public place may be seized by the police without a warrant," Payton v. New York, 445 US 573, 587, 63 L Ed 2d 639, 100 S Ct 1371 (1980), because, under these circumstances, the risk of the item's disappearance or use for its intended purpose before a warrant may be obtained outweighs the interest in possession.

The latter two examples show that the "plain view" exception simply doesn't apply, and that forfeitures are different.

Here, law enforcement was not concerned with the risk of the car's disappearance or its continued use to allegedly convey drugs because if it had been, it would not have waited *80* days to seize the car!

The statute provides that "probable cause" to seize a car like Respondent's for forfeiture occurs when drugs are possessed, transported in, or sold out of the vehicle. This has been described (with good reason) by this Court in *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 699, 85 S.Ct. 1246, 14 L.Ed.2d 170, 174 (1965) as "derivative" contraband. It is not contraband that is *per se* illegal, and it is not (in and of itself) evidence of a crime which would justify its seizure under the plain view exception to the warrant requirement.

As this Court noted in *Austin v. United States*, 509 U.S. 602, 621, 113 S.Ct. 2801, 125 L.Ed.2d 488, 505 (1993):

The Court, however, previously has rejected the Government's attempt to extend that reasoning to conveyances used to transport illegal liquor. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 14 L.Ed.2d 170, 85 S.Ct. 1246 (1965). In that case it noted:

> There is nothing even remotely criminal in possessing an automobile. *Ibid.*
>
> The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth Sedan as "contraband."[11]

At this point, the real evil of the Florida Contraband Forfeiture Act begins to become apparent. That evil is, quite simply, that the Act declares an otherwise innocent object "contraband" and then allows a law enforcement officer in the field[12] to make the subjective determination that a drug crime has occurred in the car which in turn makes this otherwise innocent vehicle "contraband." To the uninitiated, the car is just a car. To law enforcement, who has made the determination (unconstitutionally)

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[11] The statute involved in *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania* made a vehicle which carried prohibited liquor contraband, just like the Florida Contraband Forfeiture Act makes an automobile which carries drugs contraband. *One Plymouth Sedan* at 171, note 2.

[12] Interestingly enough, Title 21 United States Code 881 provides for the Attorney General of the United States to make this determination, not a field officer like the Florida Contraband Forfeiture Act. It should also be noted that 881(b) explicitly does *not* require a warrant but the Florida Statute is *silent* as to whether a warrant is required.

allowed by the Florida Contraband Forfeiture Act, the car is now "contraband." This entire process has taken place out of the purview or review of the judiciary, and is at the sole discretion of a totally biased law enforcement official, who may have interests tied to his or her department's benefit at stake.[13]

Thus, the determination that is used to evade the Fourth Amendment's proscription against unreasonable warrantless seizures is made at the whim of a law enforcement officer in the field. This is the very kind of arbitrary and capricious discretion which this Court in the past has limited. *See, Camara v. Municipal Court*, 387 U.S. 523, 529, 87 S.Ct. 1727, 18 L.Ed.2d 930, 935 (1967) wherein this Court stated [involving searches]: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, *not by a policeman or a government enforcement agent.*" [Emphasis added].

There is something even more anathema about the Act's determination that once an officer observes proscribed activity in the vehicle, the vehicle is forever contraband.[14] When the Act is allowed to declare the car

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[13] The Act allows some of the revenue from the forfeited vehicle to go to the seizing agency. *See* Section 932.704(1), Florida Statutes, which authorizes "such law enforcement agencies to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized purposes." The seizing agency may keep the seized item, further injecting the self-interest of the seizing agents. Section 932.7055(1)(a), Florida Statutes.

[14] The position of the Solicitor General is, based upon *United States v. Kemp*, 690 F.2d 397 (4th Cir. 1982), that once the

contraband forever by virtue of contraband having been transported in or sold out of it, even though the car is to all intents and purposes a lawful object to the uninitiated, and when the Act allows the law enforcement officer in the field to make that determination without prior judicial review, what the Act has done is prescribe a "*per se* rule" which is wholly inconsistent with this Court's past Fourth Amendment analysis. Should the Petitioner's argument prevail here the effect would be adoption of a *per se* rule that regardless of the circumstances, law enforcement may *always* seize vehicles and other property as derivative contraband under a forfeiture act without obtaining a warrant or demonstrating an exception to the warrant requirement. The notion that vehicle seizures occurring in plain view under a forfeiture law are always exempt from the warrant requirement runs afoul of *Florida v. Bostick, supra,* 501 U.S. 429, which "adhere[d] to the rule that, in order to determine whether a particular encounter constitutes a seizure, *a court must consider all the circumstances. . . .* " *Id.* at 439. (Emphasis added).

The Florida Supreme Court was attempting to effectuate the interests of the people under the Fourth Amendment rather than law enforcement by requiring seizures under the Contraband Forfeiture Act to be subject to the Warrant Clause. While probable cause in some cases may be virtually indisputable, other situations are not so clear.

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agent declares the vehicle contraband, it is forever contraband. (Solicitor General's amicus curiae brief at 23-24). The Solicitor General has neglected to mention that there is a split amongst the circuits on this issue as well. *United States v. Pappas,* 613 F.2d 324 (1st Cir. 1979) (en banc).

Compare, e.g., City of Edgewood v. Williams, 556 So.2d 1390 (Fla. 1990) (forfeiture not allowed), *with, Duckham v. State,* 478 So.2d 347 (Fla. 1985) (forfeiture allowed). In those close cases at least, the determination of probable cause by a judicial officer supplies protection from the non-neutral and unilateral assessment of probable cause made by law enforcement.

Obtaining a warrant or demonstrating a "traditional" exception to the warrant requirement imposes no substantial countervailing impediment to law enforcement. The Florida Supreme Court previously said the state could make an *ex parte* application to a magistrate:

> *In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the court shall authorize seizure of the personal property if it finds probable cause to maintain the forfeiture action.* (Emphasis added).

Department of Law Enforcement v. Real Property, 588 So.2d 957, 965 (Fla. 1991).

The *ex parte* proceeding thus avoids the threat that "preseizure notice and hearing might frustrate the interests. . . . " served by the forfeiture statutes. *Calero-Toledo v. Pearson Yacht Leasing Co., supra,* 416 U.S. at 659, 40 L.Ed.2d at 466. Even when property is "of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance notice of the confiscation were given," *ibid,* the interests of the state are sufficiently insulated from that possibility by having probable cause presented to a magistrate *without notice to the property's owners or possessors.*

Finally, there is another problem with the law enforcement agent making the determination allowed by the Act. The Act is still not exempted from Fourth Amendment analysis.[15] Forfeitures are not favored in the law, *United States v. One 1936 Model Ford V-8*, 307 U.S. 219, 59 S.Ct. 861, 83 L.Ed.2d 1249 (1939), and they are punitive in nature. *Austin v. United States, supra*, 509 U.S. 621-622. Hence, without judicial review, a field agent is *a priori* punishing someone by seizing their vehicle. This, without judicial oversight prior to the seizure, cannot constitutionally be tolerated.

In summary, seizures involve more than mere "possession" because once an object is seized it inevitably will be searched. The plain view exception in this case is inapplicable. It was never developed for forfeiture proceedings and derivative contraband. Moreover, the Florida Contraband Forfeiture Act, in the ultimate legislative tautology, declares the subject vehicle contraband by virtue of its transporting contraband and then allows a mere field agent to determine without judicial review that qualifying criminal behavior has occurred in the vehicle. The Act also allows an agent, again without judicial review, to punitively seize the car. In doing so, the Florida Contraband Forfeiture Act makes a rigid, absolute rule, which is disfavored in Fourth Amendment analysis.

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[15] As the court in *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992), and upon which the Florida Supreme Court heavily relied below noted: "There is no Fourth Amendment exception to 'civil forfeiture' and Congress has no right to amend the Constitution." *Id.* at 1304.

None of this was ever intended by the framers of the Constitution when the Fourth Amendment was drafted.

ARGUMENTS OF THE TWENTY-SEVEN STATES AS REPRESENTED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL REFUTED

At the outset, it cannot but help be noted that the Solicitor General's and the National Association of Attorneys General's briefs overlap. Each raises the plain view exception.[16]

Up until this point, little has been said of perhaps the most obvious question in this case, to wit: Given that 68 to 80 days elapsed between the time of the alleged illegal activity in the vehicle and the time in which the vehicle was seized why did law enforcement not bother to obtain a warrant?

Possible answers are inconvenience, arrogance, and the fact that the Florida Contraband Forfeiture Act does not explicitly require one.[17]

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[16] *See* Rule 37.1, of the rules of this Court which states, in pertinent part, that a brief which brings to the attention of the Court relevant matter not already brought to this Court's attention may be of considerable help to this Court but one that does not serve this purpose burdens the Court.

[17] The Solicitor General notes in his brief at page 2, footnote 1 that as a matter of policy, the Justice Department encourages the use of prior seizure warrants whenever practicable because of the split in the circuits. Can anyone believe that in this case given the 68 to 80 days in which to get one it was impractical to obtain a warrant? And more importantly, can anyone doubt that

None of these reasons are constitutionally good enough.

The cost involved was the warrantless seizure of Respondent's automobile, to the detriment of the Fourth Amendment. The benefit involved was that law enforcement was allowed and is allowed at the present time in 27 states and in certain federal jurisdictions to run a warrantless used car lot.

The National Association of Attorneys General representing the 27 states presents three arguments: Plain view, which has already been dealt with; the automobile exception, which will be dealt with *infra*; and a due process argument, which is not at issue.

Recall that the Government in this case has conceded that it had no probable cause to believe that contraband was present in the vehicle at the time of the seizure. (A 72). Remember, too, that the contraband itself was found wrapped in a paper towel, inside a brown bag, in the ashtray of the car, and all four doors of the car were locked. Hence, there is no possible way that law enforcement could have concluded that contraband was present in the car absent a seizure and subsequent search of the car.

The Florida Supreme Court effectively disputed the validity of the so-called automobile exception in this case:

> As previously noted, the *only* basis asserted for the unauthorized government seizure here is the

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this policy of the Justice Department will last one millisecond if this Court holds that a warrant is unnecessary under these circumstances?

so-called automobile exception to the warrant requirement. The district court majority cited *California v. Carney*, 471 U.S. 386, 391 (1985), for the proposition that automobiles are afforded less Fourth Amendment protection against warrantless searches and seizures due to their "ready mobility" and diminished expectations of privacy due to their pervasive governmental regulation. The automobile exception is predicated upon the existence of exigent circumstances consisting of the known presence of contraband in the automobile at the time, contraband will be lost if it is not immediately seized because of the mobility of the automobile. *See Chambers v. Maroney*, 399 U.S. 42 (1970). For example, in *Carney*, law enforcement officers had direct evidence[5] that illegal drugs were present and that the suspect was distributing illegal drugs from the vehicle. Accordingly, the Court concluded that the officers "had abundant probable cause to enter and search the vehicle for evidence of a crime." *Carney*, 471 U.S. at 395.

Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that *Carney* and the automobile exception are inapposite as authority. There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time

> in the past to assist in illegal activity. The exigent circumstances implicit in the former situation are simply not present in the latter situation.
>
> [5]A young man who had just left the motor home only moments before told agents of the Drug Enforcement Administration that he had received marijuana from the suspect while in the motor home. *Carney*, 471 U.S. at 388.

(A 71-72). Moreover, if it is argued that the probable cause necessary for the automobile exception is the probable cause provided by the alleged fact that the automobile was used to transport contraband, this argument has already been answered in the previous segment of this brief.

None of the applicable, existing warrant exceptions allowed the seizure of Respondent's vehicle. Unless this Court intends to knock another hole in the Fourth Amendment, the warrantless seizure of Respondent's automobile was unconstitutional.

As the Florida Supreme Court stated in footnote 7 of its opinion:

> As [former Florida Supreme Court Chief Justice Kogan] recently reminded us, the genius of our Federal and State Constitutions is that they define basic rights that neither the legislative nor executive branches can modify. [Citation omitted from Kogan's dissenting opinion]. These remarkable documents fenced off from the 'ordinary political process' these rights guaranteed by all Americans by ensuring they 'could

> not be repealed by a mere majority vote of legislators nor . . . alter[ed] through any process except constitutional amendment.' [A 75]

If the people want their Constitution amended in the circumstances presented by this case, then let them do it. This Court should not amend the Constitution by case law.

At issue is whether the Fourth Amendment will fence off law enforcement[18] to a "few well-delineated exceptions" [in the language of *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)] or whether this Court will fence the Fourth Amendment off from law enforcement and allow it to run constitutionally amok over the Constitution.

The judicial preference for a warrant will be meaningless if this Court rules against Respondent. For the people, whom this Court is sworn to protect, better to make this judicial preference a rigid absolute than to abolish it entirely.

Finally, the legality of this Court's decision is not at issue. Because this Court is last, whatever opinion it issues will be legal. But the wisdom of it is at issue. The wise thing to do is to err (if err at all) on the side of the Fourth Amendment, not law enforcement.

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[18] *See California v. Acevedo*, 500 U.S. 565, 586, 111 S.Ct. 1982, 114 L.Ed.2d 619, 638 (1991), Stevens, J., dissenting with Marshall, J., noting that "The Fourth Amendment is a restraint on Executive Power." *See also* the concurring opinion of Scalia, J., who noted that one commentator had "catalogued nearly 20 [warrantless] exceptions" to the Fourth Amendment. *Id.* at 500 U.S. 582.

As this Court noted in *Johnson v. United States*, 333 U.S. 10, 14-15, 68 S.Ct. 367, 92 L.Ed. 436 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.* (Emphasis added).

CONCLUSION

Based on the foregoing, the Respondent respectfully submits that this Court should rule that absent traditional exception to the warrant requirement of the Fourth Amendment, a warrant is required prior to seizure of property for forfeiture.

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Case No. 98-223

In The
Supreme Court Of The United States
October Term 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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Supreme Court of the United States
October Term, 1998

STATE OF FLORIDA,
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v.

TYVESSEL TYVORUS WHITE,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ARGUMENT

Respondent White and supporting *amicus*, National Association of Criminal Defense Lawyers argue in support of the decision of the Florida Supreme Court below. None of the arguments advanced are persuasive; nor do they provide a compelling basis to adopt the rationale of the Florida Supreme Court.

Both Respondent and his supporting *amicus* recognize the Fourth Amendment warrant preference is not absolute, but

subject to specifically established exceptions, carefully drawn, jealously guarded. What both fail to recognize is the well established, carefully drawn exception that an antecedent warrant is not required for seizure and subsequent search of an instrumentality where probable cause exists under, for example, the forfeiture statutes.[1]

White makes much of the fact that his cocaine stash was secreted inside a paper towel which was in turn placed in the vehicle ashtray, making it not susceptible to view from a person outside his car. However the fact that cocaine was ultimately found in the automobile is of no consequence, since the seizure was not premised on the illegal stash, but rather based on the fact that the auto was used to facilitate a previous video-taped

[1] In The Palmyra, 12 Wheat. 1, 6 L. Ed 531, 25 U.S. 1, 8 (1827), the privateer was lawfully seized and subsequently searched on probable cause that it had earlier violated an Act of Congress proscribing piracy against United States vessels on the high seas. In Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 2d 543 (1925), the car was seized and subsequently searched without warrant on probable cause that it had been used to violate prohibition statutes. In Calero-Toledo v. Pearson Yacht Leasing Co.,416 U.S. 663, 94 S. Ct. 2080, 40 L.Ed. 2d 452 (1974), the yacht was validly seized and forfeited without antecedent warrant on probable cause that it had earlier been the situs of violation of Puerto Rican drug statutes. The removal of highly mobile instrumentalities from the warrant requirement of the Fourth Amendment has long been recognized. "The exception recognized in *Carroll* is unquestionable one that is 'specifically established and well delineated.'" United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982).

drug deal. Additionally, any asserted privacy interests in the contents of the ashtray in the car was diminished by the policing authority's right to inventory the contents of the car once seizure resulted from the probable cause. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). The search here was a plain, straightforward Opperman inventory search conducted on the vehicle. The scope and validity of the search other than the attending inventory search following the seizure, was never contested below, only the constitutionality of the seizure of the vehicle under the Fourth Amendment[2]. See, California v. Carney, 471 U.S. 386,390, 105 S. Ct. 2066, 2068, 85 L. Ed. 2d 406 (1985); Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730 (1967).

The issue here is not probable cause to search the vehicle once seized, the issue is probable cause to initially seize based

[2] White also claims at n.2 of his brief that the Florida Contraband Forfeiture Act provided probable cause for this seizure. The Contraband Forfeiture Act is not a legislative grant of probable cause. The probable cause here was supplied when White was seen and videotaped dealing drugs out of his car. The Forfeiture Act on its own terms is only triggered when there is probable cause to implement it. When there exists independent probable cause to trigger it, the act then provides the statutory authority, procedure, and mechanism to seize the offending item.

on a belief that the car has been used to violate the provisions of the Florida Contraband Forfeiture Act. Any misconception over the Florida Supreme Court's statement that, "Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that Carney and the automobile exception are inapposite as authority." [A-72] is not germaine to the real issue here. Indeed there was no probable cause to believe contraband was within the car, therefore it could not properly be said that there was probable cause for a search warrant for the car. However this begs the question of whether there was probable cause to seize White's vehicle used in prior video-taped drug deals under the act. The Florida Legislature, similar to the Federal Forfeiture Statute *see,* 21 U.S.C. s 881 and the Uniform Controlled Substance Act, *see,* 9 U.L.A. s 505, has authorized the warrantless seizure of a vehicle based upon the probable cause that it has been used to facilitate a drug transaction. Neither forfeiture scheme violates the Fourth Amendment prohibition against unreasonable searches and seizure.[3]

[3] Seizure and forfeiture of automobiles which are used to facilitate offenses against the law are a common and accepted measure to deter illegality. For example, New York City has recently launched a program to seize and forfeit automobiles under NYC Administrative Code §14-140 when the driver is arrested for a Driving While Intoxicated offense. New York courts have held an automobile is forfeitable in circumstances where a teacher went into his car, which had been parked for hours in the school parking lot, to sniff cocaine, holding the car was "employed in aid or furtherance of crime." Property Clerk, New York City Police Department v. Vogel, 175 A.D.2d 760, 573 N.Y.S.2d 511, 512 (A.D. 1 Dept. 1991). The Vogel court, reversing the trial court's dismissal, said the City should be allowed to prove its claim that the car was utilized for a "portable haven for carrying on illicit activities during the school day." Id. Likewise, in Property Clerk, New York City Police Department v. Pagano, 170 A.D.2d 30, 573 N.Y.S.2d 658 (A.D. 1 Dept. 1991), the state appellate court held that a parent could be required to forfeit his car where his son had (unbeknownst to the parent) committed the offense of reckless driving by leading police on a high speed chase. Such a forfeiture could be ordered even where the criminal driving charge against the son was dismissed. 573 N.Y.S.2d at 569-560. However, relying in part on Calero-Toledo, infra, the court held the City had to establish the car owner "permitted or suffered the illegal use of the property", Id. at 660 (internal quotation mark and emphasis deleted), and that the proof in this case was deficient on this requirement. Id. at 661.

Once probable cause existed under the forfeiture statute, the question then simply becomes whether police had to move immediately without warrant under the forfeiture act to seize the car and/or did the probable cause continue to exist until a later time to seize, without warrant, under the same act. Prior usage of the vehicle in violation of the forfeiture law is sufficient to generate the necessary probable cause.[4]

[4] White failed to assert a due process challenge as to whether a pre-seizure warrant was required, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 676-680, 94 S. Ct. 2080, 2088-2090, 40 L. Ed. 2d 452 (1974); United States v. Valdes, 876 F.2d 1554, 1560 at fn. 12 (11th Cir. 1989).

White contends that utilization of the Florida Contraband Forfeiture Act transforms seizures made thereunder into some form of *per se* exemption from the Fourth Amendment's warrant preference. This is no more true than had the police, at the time they witnessed and videotaped respondent dealing drugs out of his car, immediately seized the automobile. It is not argued by any party that the police would have been required to obtain a warrant to seize and search the automobile at that instant in those circumstances. Indeed, there would be no question that the warrantless seizure and search of the car was permissible, along with the following forfeiture action under the statute and the introduction into evidence at White's criminal trial. It does not become any more a *per se* exception to the Fourth Amendment warrant preference to permit later warrantless seizure under the forfeiture statute.

White attaches much to the proposition that his automobile in and of itself is a lawfully possessed thing. However, this is a distinction without a difference.[5] His car, once used to

[5] The vehicle, lawful in its nature, changed its character when White used it as an instrumentality in his drug business. Once used to effectuate illegality, as stated in The Palmyra, 12 Wheat. 1, 25 U.S. 1, 14, 6 L.Ed. 531 (1827), "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the

distribute drugs, became the offender at the time so used, whether the offense be intrinsically unlawful, or only so by operation of law. Items that are perfectly lawful and legitimate are seizable and subject to forfeiture if they have been the *res* of violation of a statutory proscription or requirement. See One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (jewels and ring forfeited due to being brought into the country without being declared, as required by customs laws); United States v. Eight Thousand Eight Hundred and Fifty Dollars in U.S. Currency, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) (United States currency).

White notes that in the briefs of *amici*, the Solicitor General of the United States and the National Association of Attorneys General, it is argued that the seizure of the automobile was permissible under the "plain view" doctrine. Wherever and whenever police thereafter observe the instrumentality in plain view, they can validly seize it. Especially so in a case like this, where car is seized while in the parking lot of a retail store, and not in the driveway of a private

offense be malum prohibitum, or malum in se."

residence or some other such locus where there exists a possible reasonable expectation of privacy. Compare Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion) (seizure of car from a public, commercial parking lot) with Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion) (seizure of car from a residential driveway).

The fact that there was a 68-day hiatus between the time probable cause arose and the date of seizure implicates no constitutional protection, and is akin to an argument that the vehicle had a right to a speedy arrest for example. United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). It is certainly no answer to say the police had time to get a warrant in this interval. Cooper. The seizure without warrant did nothing to adversely affect White's ability from asserting any possible defense under the forfeiture act. There is thus no constitutional deficiency from that perspective. United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency, supra.

In attempting to distinguish case law permitting warrantless seizures of persons, White argues that persons so seized have a plethora of procedural protections. This argument ignores

equally voluminous procedural protections regarding the seizure of a vehicle, many of which are set out in the Florida Contraband Forfeiture Act. His point, apparently, is that some sort of constitutional violation is established because, under Florida law, a person seized without warrant must have a first appearance before a magistrate within 24 hours of seizure. In contrast, he argues the car seized without warrant does not have the propriety of its seizure examined by a magistrate, under the statute, until 10 days after such is requested. All of which ignores the central point that persons can be seized and jailed without antecedent warrant, as well as inanimate objects. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (seizure of person); G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1997) (seizure of automobile of alter ego corporation from a public street to satisfy a personal tax liability).

Lastly, White attempts to explain the holdings permitting the warrantless seizure of persons on the basis that such is permissible because it serves important public safety concerns. The obvious point, of course, is that equally weighty public safety concerns are served by removing vehicles used in drug

deals from circulation.[6] Such concern has been noted with approval by the Court. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, at 2090, 40 L.Ed.2d 452 (1974): Seizure fosters "the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions."

[6] That police waited 68 days to do this does not undercut the validity of this public interest concern. Police may have good and valid reasons to wait before immediately seizing a car, such as pursuing other leads generated by the observed transaction, not wanting to "burn" a confidential informant, or seeing if it is possible to discover bigger players in the drug business, such as a dealer's source of supply, by surveilling the dealer over a period of time. All legitimate reasons -- which do not denigrate the original probable cause to seize.

CONCLUSION

Based on the foregoing discussions, Petitioner, the State of Florida respectfully submits that the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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No. 98-223

In the Supreme Court of the United States

OCTOBER TERM, 1998

FLORIDA, PETITIONER

v.

TYVESSEL TYVORUS WHITE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment permits the warrantless seizure and subsequent inventory search of an automobile based on probable cause to believe that the vehicle is subject to forfeiture pursuant to a state statute authorizing such seizures, the Florida Contraband Forfeiture Act, Fla. Stat. Ann. §§ 932.701 *et seq.* (West 1996 & Supp. 1999).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The seizure in this case was effected pursuant to the Florida Contraband Forfeiture Act, Fla. Stat. Ann. §§ 932.701 *et seq.* (West 1996 & Supp. 1999). A similar federal statute provides for forfeiture of, *inter alia*, any vehicle that is used or intended for use in transporting or in any manner facilitating the transportation, sale, receipt, possession, or concealment of various described property, including controlled substances. 21 U.S.C. 881(a)(4). The federal statute specifically authorizes the seizure of property without prior judicial process when "the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter." 21 U.S.C. 881(b)(4). Because the Court's

decision in this case will likely affect the ability of federal law enforcement officers to exercise the authority conferred by Section 881(b)(4), the United States has an interest in the outcome of this case.[1]

STATEMENT

1. The Florida Contraband Forfeiture Act, Fla. Stat. Ann. §§ 932.701 *et seq.* (West 1996 & Supp. 1999), establishes substantive and procedural rules for the forfeiture of, *inter alia*, property used in the commission of a felony. The Act defines the term "[c]ontraband article" to include "[a]ny controlled substance as defined in chapter 893," *id.* § 932.701(2)(a)1 (Supp. 1999), as well as "any vessel, aircraft, * * * [or] vehicle of any kind, * * * which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony," *id.* § 932.701(a)5 (Supp. 1999). The Act makes it unlawful to transport any contraband article "by means of any vessel, motor vehicle, or aircraft," *id.* § 932.702(1) (1996); "[t]o conceal or possess any contraband article," *id.* § 932.702(2) (1996); to use any real or personal property "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article," *id.* § 932.702(3) (1996); or to "use any contraband article as an instrumentality in the commission of

[1] As a matter of policy, particularly in light of the fact that the federal courts of appeals have reached differing conclusions as to the propriety of warrantless seizures of forfeitable property (see note 3, *infra*), the Department of Justice encourages the use of prior seizure warrants whenever practical. See Asset Forfeiture & Money Laundering Section, U.S. Dep't of Justice, *Asset Forfeiture Law and Practice Manual*, Ch. 2, at 20-21 (June 1998). The federal statute, however, contains no such requirement.

or in aiding or abetting in the commission of any felony or violation of the Florida Contraband Forfeiture Act," *id.* § 932.702(4) (1996).

The Florida Contraband Forfeiture Act states:

> Any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which any violation of the Florida Contraband Forfeiture Act has taken or is taking place, may be seized and shall be forfeited subject to the provisions of the Florida Contraband Forfeiture Act.

Fla. Stat. Ann. § 932.703(1)(a) (West Supp. 1999). The Act provides that "[a]ll rights to, interest in, and title to contraband articles * * * shall immediately vest in the seizing law enforcement agency upon seizure," *id.* § 932.703(1)(c) (Supp. 1999), though the seizing agency is prohibited from using the seized property until its susceptibility to forfeiture has been finally determined, see *id.* § 932.703(1)(d) (Supp. 1999). Under the Act, "[p]ersonal property may be seized at the time of the violation or subsequent to the violation," so long as the person from whom the property is seized is promptly notified of his right to a post-seizure hearing. *Id.* § 932.703(2)(a) (Supp. 1999). The Act also provides that "[p]roperty may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that the owner either knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity." *Id.* § 932.703(6)(a) (Supp. 1999). The Act contains no provision requiring that seizures of contraband articles be authorized by a judicial warrant.

2. On October 14, 1993, respondent Tyvessel Tyvorous White was arrested at his workplace on a charge of selling a controlled substance (a charge unrelated to the instant case). After he was taken into custody and the police obtained the keys to his car, the arresting officers seized respondent's automobile from the parking lot at his place of employment. The officers had not obtained a judicial warrant for the seizure. The basis for the seizure was the officers' belief, based on police eyewitnesses and videotapes, that the car had been used in the delivery and sale of cocaine on three previous occasions in July and August 1993. The car was transported to police headquarters, where an inventory search revealed two pieces of crack cocaine in the ashtray. Respondent was then charged with possession of cocaine. Pet. App. A2-A3 & n.2, A25-A26.

Respondent moved to suppress the cocaine. The trial court reserved ruling on the motion to suppress until after the jury had rendered its verdict. After the jury found respondent guilty, the court denied the motion. Pet. App. A26.

3. The Florida First District Court of Appeal affirmed respondent's conviction. Pet. App. A24-A45. The court first held that the warrantless seizure was consistent with the Florida Contraband Forfeiture Act. *Id.* at A27-A29. The court explained that "the only pre-seizure procedural requirement under the Forfeiture Act is the giving of a notice of the right to a subsequent hearing," and that respondent did not allege a violation of that requirement. *Id.* at A27-A28. The court also rejected respondent's contention that the seizure was invalid because the seizing officers did not have probable cause to believe that the vehicle contained contraband at the time the seizure occurred. Rather, the court explained, "[u]nder the Forfeiture Act, the

seizing agency is required only to have probable cause to believe that the property sought to be seized 'was used, is being used, was attempted to be used, or was intended to be used' in violation of the Forfeiture Act." *Id.* at A28 (quoting Fla. Stat. Ann. § 932.703(2)(c) (1993)). The court of appeal also observed that "[n]othing in the Forfeiture Act requires the obtaining of a warrant or court order before seizing a vehicle." *Ibid.*

The court next held that the warrantless seizure of respondent's automobile did not violate the Fourth Amendment. The court principally relied on the Eleventh Circuit's decision in *United States* v. *Valdes*, 876 F.2d 1554 (1989), which upheld a warrantless seizure conducted pursuant to the federal forfeiture statute (see note 1, *supra*) on the ground that "[i]f federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs." *Id.* at 1559-1560 (quoted at Pet. App. A31).[2] The district court of appeal stated that it was "also influenced in [its] holding by the fact that the property seized here was a motor vehicle, a type of property found by the Supreme Court to have less Fourth Amendment protection against warrantless searches and seizures under the so-called 'automobile exception.'" Pet. App. A31. The court also held that

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[2] The Eleventh Circuit in *Valdes* placed substantial reliance on this Court's decision in *United States* v. *Watson*, 423 U.S. 411 (1976), which held that the Fourth Amendment permits warrantless arrests in public places, where the arresting officer has probable cause to believe that an individual has committed a felony. See 876 F.2d at 1558-1559.

"[b]ecause * * * the police properly seized the [respondent's] vehicle under the Forfeiture Act, * * * the subsequent inventory search was reasonable and, thus, the cocaine seized in the vehicle was properly admitted at trial." *Id.* at A32. Noting that the federal courts of appeals were in conflict as to the propriety of warrantless seizures under the federal forfeiture statute,[3] the district court of appeal certified to the Florida Supreme Court the question whether the warrantless seizure in this case complied with the Fourth Amendment. See *id.* at A33.

4. The Florida Supreme Court reversed. Pet. App. A1-A22. The court held that in the absence of exigent circumstances, the Fourth Amendment requires that the seizure of property pursuant to the state Forfeiture Act must be preceded by an ex parte preliminary hearing before a neutral magistrate. *Id.* at A4-A8. The court found the "automobile exception" to be inapplicable to this case because the seizing officers did not have probable cause to believe that the vehicle contained contraband at the time of the seizure. *Id.* at A8-A11. The court also noted that there were no exigent circumstances that might have made it impractical to obtain a warrant. *Id.* at A11. The court relied heavily on the Second Circuit's decision in *United States* v. *Lasanta*, 978 F.2d 1300 (1992), which concluded that a judicial warrant is constitutionally required in order to effect a seizure of property under the federal forfeiture statute. See Pet. App. A4-A6 & n.4, A10-A11. The court also relied on *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), for the proposition that "absent exigent circumstances, police must secure a warrant for the search and seizure of an automobile." Pet. App. A13 n.8.[4]

Two justices dissented, noting that the weight of authority supports the view that no warrant is needed for a seizure of a vehicle when there is probable cause to believe that the vehicle is subject to forfeiture. Pet. App. A14-A21.

[3] Six courts of appeals have concluded that the Fourth Amendment permits the warrantless seizure, pursuant to the federal forfeiture statute, of vehicles found in public areas. See *United States* v. *Dixon*, 1 F.3d 1080, 1084 (10th Cir. 1993) (finding warrant requirement generally applicable, but holding that warrantless seizure of vehicle left in public place was justified under "plain view" exception to warrant requirement); *United States* v. *Pace*, 898 F.2d 1218, 1241-1242 (7th Cir.), cert. denied, 497 U.S. 1030 (1990); *Valdes*, 876 F.2d at 1558-1560 & n.14; *United States* v. *$29,000–U.S. Currency*, 745 F.2d 853, 856 (4th Cir. 1984); *United States* v. *One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1299-1303 (5th Cir. 1983); *United States* v. *Bush*, 647 F.2d 357, 368-370 (3d Cir. 1981). Two courts of appeals have issued contrary decisions. See *United States* v. *Lasanta*, 978 F.2d 1300, 1303-1306 (2d Cir. 1992); *United States* v. *Linn*, 880 F.2d 209, 214-215 (9th Cir. 1989).

SUMMARY OF ARGUMENT

1. Because a seizure of property affects the owner's possessory interest, while a search intrudes upon expectations of privacy, this Court has recognized that the standards of reasonableness governing the two forms of government action are not equivalent. The Court has repeatedly held that warrantless seizures

[4] The Florida Supreme Court rejected the district court of appeal's conclusion that "since a defendant's person can be seized without a warrant his property should be no different." Pet. App. A12. The court stated that "[i]f we were to follow that reasoning to its logical conclusion we would, in essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property." *Ibid.*

based on probable cause are presumptively constitutional, so long as law enforcement officers are legally present at the site and the seizure is effected in a manner that does not involve any unauthorized intrusion on privacy interests. When this Court has invalidated warrantless probable-cause seizures of property, it has done so on the ground that the seizure in question was facilitated by an unauthorized search. The Court has applied the same principles to seizures of the person, permitting warrantless felony arrests in public places, but holding that the intrusion on privacy inherent in a home arrest requires a judicial warrant.

2. In *Horton* v. *California*, 496 U.S. 128 (1990), this Court set forth the criteria governing warrantless seizures of property based on probable cause. Such seizures are permissible if (a) the seizing officers are lawfully present at the vantage from which they view the relevant items, (b) the requisite probable cause is "immediately apparent" without a search of the items themselves, and (c) the officers have a lawful right of access to the seized objects. The seizure at issue in this case satisfies those requirements. Because respondent's automobile was seized from the parking lot of respondent's place of employment, rather than from a location where respondent possessed a reasonable expectation of privacy, no judicial warrant was required for the officers to view or approach the vehicle. And because no intrusion into the car itself was necessary to establish the requisite probable cause, the automobile's susceptibility to forfeiture was "immediately apparent" within the meaning of this Court's decisions.

3. The absence of exigent circumstances does not invalidate the seizure of respondent's automobile. This Court has not suggested that a warrantless seizure of property found in plain view must be supported by a

case-specific showing of exigent circumstances. The Florida Supreme Court's suggestion that such a showing is required improperly conflates the constitutional rules governing seizures with those that apply to searches. In *United States* v. *Watson*, 423 U.S. 411 (1976), this Court specifically rejected the contention that a warrantless felony arrest in a public place requires exigent circumstances, and the *Watson* Court's reasoning is equally applicable to seizures of property.

4. So long as the seizing officers had probable cause to believe that respondent's automobile had previously been used to facilitate narcotics trafficking, the seizure was valid. The vehicle's susceptibility to forfeiture did not depend on proof that the car contained contraband at the time it was seized; use for illicit purposes at any time in the past suffices under the Florida forfeiture law. The propriety of the seizure therefore did not depend on whether the police had probable cause to believe that the car contained drugs at the time it was seized.

5. Inventory searches of vehicles taken into police custody are not subject to the warrant and probable cause requirements that ordinarily apply to searches. Those searches are reasonable so long as they are conducted pursuant to standardized criteria that adequately constrain police discretion in individual cases. The Florida district court of appeal upheld the post-seizure search of respondent's vehicle as a permissible inventory search. The Florida Supreme Court did not suggest that the search was impermissible under this Court's inventory search jurisprudence; its suppression of the evidence discovered during the search was based on the perceived impropriety of the earlier seizure. Assuming that the search was conducted pursuant to appropriate standardized criteria, the evidence seized

from the vehicle was properly admitted at respondent's criminal trial.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A WARRANTLESS SEIZURE AND SUBSEQUENT INVENTORY SEARCH OF PROPERTY BASED ON PROBABLE CAUSE TO BELIEVE THAT THE PROPERTY IS SUBJECT TO FORFEITURE, SO LONG AS THE SEIZURE INVOLVES NO INTRUSION ON PRIVACY RIGHTS

The Fourth Amendment forbids both unreasonable "searches" and unreasonable "seizures." U.S. Const. Amend. IV. This Court has recognized, however, that "the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures." *Arizona* v. *Hicks*, 480 U.S. 321, 328 (1987). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984); accord *Soldal* v. *Cook County*, 506 U.S. 56, 62-63 (1992); *Horton* v. *California*, 496 U.S. 128, 133 (1990).

Seizures may be undertaken by means of or in conjunction with searches, but that is not always the case. The seizure of respondent's automobile from the parking lot of his place of employment, for example, involved no intrusion on any constitutionally protected privacy interest. See, *e.g.*, *Minnesota* v. *Dickerson*, 508 U.S. 366, 377 (1993) ("The seizure of an item whose identity is already known occasions no further invasion of privacy."); *Horton*, 496 U.S. at 133 ("If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy."). The sole immediate effect of the seizure was an intrusion on possessory interests.

Even where (as here) a seizure is effected in a manner that involves no intrusion on privacy, it remains subject to the Fourth Amendment's reasonableness requirement. See *Soldal*, 506 U.S. at 62-66 (rejecting contention that seizures involving no intrusion on privacy or personal liberty are immune from scrutiny under the Fourth Amendment). To satisfy that requirement, such seizures must generally be supported by probable cause. See *id.* at 66; *Hicks*, 480 U.S. at 326-327. But this Court has repeatedly recognized that a warrant is not required for a seizure based on probable cause, so long as the seizure is effected in a manner that involves no intrusion on privacy rights.

A. This Court Has Repeatedly Upheld Warrantless Seizures Based Upon Probable Cause, So Long As The Seizure Is Effected In A Manner That Does Not Involve Any Intrusion On Privacy Interests

In a broad variety of circumstances, this Court has recognized that warrantless seizures based on probable cause are presumptively constitutional, so long as law enforcement officers are legally present at the site and the seizure is effected in a manner that does not involve any unauthorized intrusion on privacy interests. In *Payton* v. *New York*, 445 U.S. 573 (1980), the Court stated that it is:

> well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that

there is probable cause to associate the property with criminal activity.

Id. at 586-587. In *Jacobsen*, the Court referred to the "well settled" rule "that it is constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband." 466 U.S. at 121-122. In *Dickerson*, the Court explained that "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." 508 U.S. at 375. See also, *e.g.*, *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983) (seizure authorized if officer has some prior Fourth Amendment justification for presence and "has probable cause to suspect that the item is connected with criminal activity"); *Texas* v. *Brown*, 460 U.S. 730, 739 (1983) (plurality opinion) (this Court's "decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately"); *id.* at 748 (Stevens, J., concurring in judgment) ("if an officer has probable cause to believe that a publicly situated item is associated with criminal activity, * * * [t]he officer may * * * seize it without a warrant").

The Court has applied that principle in a variety of circumstances: to a boat seized on public waters, where Coast Guard officers had probable cause to believe that revenue laws were being violated so as to render the vessel subject to forfeiture, *United States* v. *Lee*, 274 U.S. 559, 563 (1927); to evidence found in an impounded car in the course of securing the vehicle, *Harris* v.

United States, 390 U.S. 234, 235-236 (1968); to items found in a private place where a third party had given consent to search, *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969); to cars found in public streets or parking lots, when officers had probable cause to believe that the cars were subject to seizure for satisfaction of tax assessments, *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351-352 (1977); to a package containing illegal drugs when private parties had already opened the package and revealed the suspicious substance, *Jacobsen*, 466 U.S. at 120-122; and to evidence found in plain view in a house being searched pursuant to a warrant, *Horton*, 496 U.S. at 131, 139-141.

When this Court has invalidated warrantless seizures of property, it has not suggested that a seizure *qua* seizure—*i.e.*, a deprivation of possessory interests unaccompanied by any intrusion on privacy—itself requires a judicial warrant. Rather, it has explained that the seizure in question was facilitated by an unauthorized "search."[5] Thus, in *Dickerson*, a police

[5] In *United States* v. *Place*, 462 U.S. 696, 701 (1983), this Court stated that "[i]n the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." That statement might appear to be in tension with the Court's frequent assertions (see pp. 11-12, *supra*) that a seizure of property does not require a judicial warrant because it implicates possessory rather than privacy interests. Any tension, however, is semantic rather than real. The Court in *Place* noted that a warrantless seizure is permitted if a "recognized exception to the warrant requirement is present," and it gave as an example of such an exception the established rule that "objects such as weapons or contraband found in a public place

officer conducted a weapons patdown (see *Terry* v. *Ohio*, 392 U.S. 1 (1968)) near a building known to be a site of cocaine trafficking. See 508 U.S. at 368-369. The state supreme court found that, although the patdown was initially justified, the officer continued to probe the contents of the suspect's pocket even after ascertaining that it did not contain a weapon. See *id.* at 378. The officer ultimately discovered and seized a lump of crack cocaine. *Id.* at 369. This Court held that the seizure would have been lawful if the cocaine's identity as contraband had become apparent during the authorized *Terry* search. See *id.* at 375-376. The Court held, however, that because the officer had violated the Fourth Amendment by continuing the search after determining that the suspect did not possess a weapon, the subsequent warrantless seizure of the cocaine was unconstitutional. *Id.* at 379. Similarly in *Hicks*, the Court invalidated the seizure of stolen stereo equipment because the seizing officers had obtained

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may be seized by the police without a warrant." *Ibid.* (quoting *Payton*, 445 U.S. at 587).

The thrust of this Court's "plain-view" cases is that a seizure does not require a judicial warrant so long as it is effected in a manner that involves no intrusion on privacy interests. The Court in *Place* characterized that principle as an exception to a general rule that warrantless seizures of property are prohibited. Alternatively, one might say that a warrant is not required for a seizure of property *qua* seizure, but only for the *search* that frequently facilitates a seizure. Cf. *Brown*, 460 U.S. at 737-739 (plurality opinion). On that view, if a police officer's course of conduct involves both a search and seizure, and the officer neither obtains a warrant nor acts pursuant to an exception to the warrant requirement, the seizure is unreasonable because it is accomplished by means of an unlawful warrantless search. Compare *Dickerson*, 508 U.S. at 379. The difference between the two formulations, however, has no substantive significance.

probable cause to believe that the equipment was stolen only after conducting an unauthorized search. 480 U.S. at 324-329; see *Dickerson*, 508 U.S. at 378-379 (discussing *Hicks*).[6]

The Court has applied the same principles to seizures of the person. Consistent with the Fourth Amendment, officers may arrest an individual in a public place without a warrant based on probable cause to believe that the person has committed a felony. See *United States* v. *Watson*, 423 U.S. 411, 416-424 (1976). A warrant is presumptively required for a felony arrest within the home, however. See *Payton*, 445 U.S. at 583-590. The *Payton* Court explained that such an arrest involves a substantial intrusion into an individual's "zone of privacy." See *id.* at 587-590. The Court relied, by way of analogy, on the established "distinction between a warrantless seizure [of property] in an open area and such a seizure on private premises,"

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[6] The Florida Supreme Court erred in relying (see Pet. App. A13 n.8) on *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), for the proposition that any warrantless seizure of property from a public place is presumptively unconstitutional. To begin with, "Justice Stewart's analysis of the 'plain-view' doctrine did not command a majority" of the *Coolidge* Court. *Horton*, 496 U.S. at 136. In any event, *Coolidge* is distinguishable from this case in two significant respects. First, "in *Coolidge*, the [seized] cars were obviously in plain view, but their probative value remained uncertain until after the interiors were swept and examined microscopically." *Horton*, 496 U.S. at 137. In this case, no search of respondent's automobile was necessary to establish probable cause that it was susceptible to forfeiture. Second, "the seizure of the cars [in *Coolidge*] was accomplished by means of a warrantless trespass on the defendant's property." *Ibid.* Respondent's vehicle, by contrast, was seized from his place of employment in a manner that involved no intrusion on respondent's privacy interests.

concluding that "this distinction has equal force when the seizure of a person is involved." *Id.* at 587.[7]

B. The Seizure At Issue In This Case Satisfied The Requirements Set Forth In This Court's Decision In *Horton* v. *California*

This Court's decision in *Horton* sets forth the criteria governing warrantless seizures. The seizure of respondent's automobile satisfies the requirements announced in that opinion.

In *Horton*, a police officer obtained a warrant to search the home of a person suspected of involvement in an armed robbery. The warrant issued by the magistrate authorized a search for the proceeds of the crime, including three specifically described rings. 496 U.S. at 131. The officer conducting the search did not find the stolen property. In the course of performing the search, however, the officer found in plain view weapons resembling those used in the robbery, as well as other

[7] The Florida Supreme Court rejected the analogy between seizures of the person and seizures of property, stating that to treat the two similarly "would, in essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property." Pet. App. A12. The court's apparent premise was that searches of property should logically be subject to the identical constitutional constraints as seizures of property. That analysis overlooks this Court's repeated recognition that because the burden imposed by a seizure of property (deprivation of the owner's possessory interest) is different in kind from the invasion of privacy caused by a search, the Fourth Amendment reasonableness of those two types of government action must be assessed according to different criteria. The state court's rejection of the analogy between seizures of property and seizures of the person is especially ill-considered since this Court expressly relied on that analogy in holding that a warrant is presumptively required for an arrest within the home. See *Payton*, 445 U.S. at 586-587.

items linking the homeowner to the crime. See *ibid.* Those items were introduced into evidence at trial, and Horton was convicted. *Ibid.*

This Court held that the officer had acted properly in seizing the items found in plain view during the course of the search, even though no judicial warrant authorized the seizure. The Court found that the officer had probable cause to believe that the seized items inculpated Horton in the armed robbery. 496 U.S. at 142. In addition to the probable cause requirement, the Court identified three prerequisites to warrantless seizures of property under the Fourth Amendment:

> [1] It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. [2] * * * [N]ot only must the item be in plain view; its incriminating character must also be "immediately apparent." [*Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971)]; see also *Arizona* v. *Hicks*, 480 U.S., at 326-327. Thus, in *Coolidge*, the cars were obviously in plain view, but their probative value remained uncertain until after the interiors were swept and examined microscopically. [3] * * * [N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself. As the United States has suggested, Justice Harlan's vote in *Coolidge* may have rested on the fact that the seizure of the cars was accomplished by means of a warrantless trespass on the defendant's property.

Id. at 136-137 (footnote omitted). The seizure conducted in this case satisfies each of those requirements.

1. The first requirement articulated in *Horton* is that the officer conducting the seizure must lawfully be present at the vantage from which the seized item is viewed. That requirement may generally be satisfied in either of two ways. In some instances (as in *Horton* itself), officers may lawfully be present in a non-public place, pursuant to (for example) a judicial warrant or the consent of the resident. See *Brown*, 460 U.S. at 738 n.4 (plurality opinion). "Alternatively, police may need no justification under the Fourth Amendment for their access to an item, such as when property is left in a public place." *Ibid.*

The officers in this case were lawfully present at the location from which the seized car was viewed. Respondent's automobile was seized not from a place (such as a residential garage) that was inaccessible to the public generally, but from the parking lot of respondent's employer. Neither of the courts below suggested that the police, in ascertaining the location of the vehicle and in effecting the seizure, intruded on any location where respondent (or anyone else) had a legitimate expectation of privacy.

2. The automobile's susceptibility to seizure was "immediately apparent" within the meaning of this Court's decisions. That requirement is satisfied so long as an item's susceptibility to seizure can be ascertained "without conducting some further search of the object." *Dickerson*, 508 U.S. at 375. See also *id.* at 378-379; *Hicks*, 480 U.S. at 324-329 (seizure of stereo equipment from private residence was not justified by "plain view" doctrine, since officers obtained probable cause to believe the item was stolen only as a result of an unauthorized search).[8]

In this case, the police had probable cause, "based on police eyewitnesses and videotape," to believe that respondent's car had been used in drug trafficking activity and was therefore subject to forfeiture. See Pet. App. A25-A26. Neither of the courts below suggested that any intrusion into the car itself was required in order to establish the requisite probable cause. Because the susceptibility of the car to seizure was established without resort to any Fourth Amendment "search," that susceptibility was "immediately apparent" to the seizing officers.

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[8] The requirement that an item's susceptibility to seizure be "immediately apparent" does not require a level of certainty greater than probable cause. See *Brown*, 460 U.S. at 741-742 (plurality opinion); see also *id.* at 746 (Powell, J., concurring in judgment) (applying probable cause standard); *id.* at 748 (Stevens, J., concurring in judgment) (same). Susceptibility to seizure may be "immediately apparent," moreover, even if close scrutiny or artificial illumination is required in order to verify the existence of probable cause, so long as the officers' scrutiny of what is in plain view does not involve a "search" within the meaning of the Fourth Amendment. See *id.* at 739-740 & n.5 (plurality opinion); *Lee*, 274 U.S. at 563; compare *Hicks*, 480 U.S. at 329 (contrasting a "search" with "close observation of what lies in plain sight").

Finally, an item's susceptibility to seizure may be "immediately apparent" even if the propriety of seizure depends in part on preexisting information that cannot be gleaned purely from observation of the object itself. In *Horton*, for example, the incriminating character of the relevant items was immediately apparent because those items matched descriptions given by witnesses to the crime for which the homeowner was investigated. See 496 U.S. at 130-131. Similarly in *Brown*, the finding of probable cause was based in part on the seizing officer's expertise concerning the manner in which narcotics are customarily packaged. See 460 U.S. at 742-743 (plurality opinion); *id.* at 746 (Powell, J., concurring in judgment).

3. For essentially the same reason that the police in this case were lawfully at the location where they viewed respondent's car, the officers "ha[d] a lawful right of access to the object itself." *Horton*, 496 U.S. at 137. Because the car was located in a public place, its seizure did not involve an official intrusion into any area protected by the Fourth Amendment.[9] The seizure of respondent's automobile therefore satisfied each of the three requirements for a warrantless seizure set forth in this Court's opinion in *Horton*.

C. The Absence Of Exigent Circumstances Does Not Invalidate The Seizure Of Respondent's Automobile

The Florida Supreme Court's decision in this case rests in part on its determination that no exigent circumstances prevented the police from obtaining a judicial warrant. See Pet. App. A11, A12-A13 & n.8. In upholding warrantless seizures of property found in

[9] Situations may occasionally arise in which the first *Horton* requirement has been satisfied—*i.e.*, "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed," 496 U.S. at 136—but the officer nevertheless lacks "a lawful right of access to the object itself," *id.* at 137. For example, in *Taylor* v. *United States*, 286 U.S. 1 (1932), prohibition officers were able to smell whiskey coming from a garage on private property and could see through an opening in the garage "many cardboard cases which they thought probably contained jars of liquor." *Id.* at 5. Although the Court's opinion is not altogether clear on this point, the agents appear to have been lawfully situated in a public area at the time they made their observations. (The Court described the garage as being located "on the corner of a city lot," *ibid.*, and it indicated that the agents' observations could have formed the predicate for the issuance of a warrant and a subsequent lawful search, *id.* at 6.) The Court nevertheless held that the agents' seizure of whiskey was unlawful, since it was effected by means of a warrantless entry into the garage itself. *Id.* at 5-6; see *Horton*, 496 U.S. at 137 n.7.

open view, however, this Court has not suggested that such a seizure must be supported by a case-specific showing of exigent circumstances. The Florida court's analysis improperly conflates the constitutional rules governing seizures with those that apply to searches, in derogation of this Court's repeated recognition that the two forms of government action implicate different private interests and are accordingly subject to different constraints.

In *Watson*, this Court specifically rejected the contention that the propriety of a warrantless felony arrest in a public place depends on a showing of exigent circumstances. See 423 U.S. at 415. The Court acknowledged that "[l]aw enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate." *Id.* at 423. The Court nevertheless "decline[d] to transform this judicial preference into a constitutional rule" that might "encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances." *Ibid.*[10] The same analysis applies here.

[10] The Court in *Watson* relied in part on the fact that "Congress ha[d] plainly decided against conditioning warrantless arrest power on proof of exigent circumstances." 423 U.S. at 423. The Court noted the "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable.'" *Id.* at 416 (quoting *United States* v. *Di Re*, 332 U.S. 581, 585 (1948)). As we explain above (see pp. 1-2, *supra*), Congress has specifically authorized the seizure of property without prior judicial process where the Attorney General concludes that there is probable cause to believe that the property is subject to forfeiture.

D. So Long As The Police Had Probable Cause To Believe That Respondent's Vehicle Had Previously Been Used To Facilitate Narcotics Trafficking, The Seizure Of The Automobile Was Valid

Respondent's automobile was seized "on the grounds that, based on police eyewitnesses and videotape, it had been used in the delivery and sale of cocaine." Pet. App. A25-A26. The seizure occurred on October 14, 1993; the alleged trafficking activities occurred on July 26, 1993, and August 4 and 7, 1993. *Id.* at A2 & n.2. Based on police testimony given in the trial court, the district court of appeal concluded that "the police had probable cause to believe [respondent's] vehicle had been used to facilitate the sale of cocaine." *Id.* at A43 n.3.

Although the Florida Supreme Court did not suggest that the seizing officers lacked probable cause to believe that respondent's automobile had previously been used in drug trafficking activities, it attached significance to the fact that "the government had no probable cause to believe that contraband was present in [respondent's] car" at the time the seizure occurred. Pet. App. A9. The absence of probable cause to believe that the automobile presently contained contraband would indeed have precluded the officers from *searching* the vehicle before its seizure. For a search to be reasonable, officers must generally have probable cause "to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 556 (1978).[11] See also *Andresen* v. *Maryland*, 427 U.S. 463,

[11] Although the "automobile exception" to the Fourth Amendment warrant requirement authorizes warrantless searches of movable vehicles, a search conducted pursuant to that exception must be based on probable cause. See *California* v. *Carney*, 471 U.S. 386, 392 (1985). As we explain below (see pp. 24-26, *infra*), however, the search of respondent's automobile was conducted after the car was taken into police custody, and its validity turns on the applicability of the "inventory search" exception to the Fourth Amendment's warrant and probable cause requirements.

478-479 n.9 (1976) (where significant delay occurs between events giving rise to probable cause and actual search of offices, search is reasonable if items sought are of a type that would typically be held for an extended period of time).

The susceptibility of respondent's automobile to forfeiture, however, does not depend on whether it contained narcotics at the time of its seizure. The Florida Contraband Forfeiture Act defines "[c]ontraband article" to include "any vessel, aircraft, * * * [or] vehicle of any kind, * * * which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony." Fla. Stat. Ann. § 932.701(a)5 (West Supp. 1999). If respondent had in fact used the car to facilitate the sale of narcotics, as the officers reasonably believed, the subsequent removal of the drugs from the vehicle would not have immunized the car from forfeiture. And so long as the seizing officers had probable cause to believe that the automobile was subject to forfeiture based on its prior unlawful use, the propriety of the seizure did not depend on any likelihood that the car presently contained drugs or other incriminating evidence. See *United States* v. *Kemp*, 690 F.2d 397, 401 (4th Cir. 1982) (probable cause to believe that property has previously been used in violation of the drug laws is sufficient to justify seizure under the federal forfeiture statute; "[t]his type of probable cause can never

dissipate as probable cause for a search warrant may become stale").

Indeed, even the Florida Supreme Court did not dispute that respondent's vehicle could lawfully have been seized based on probable cause to believe that the car had previously been used to facilitate narcotics crimes. The court simply held that the requisite finding of probable cause must be made by a neutral magistrate. For the reasons set forth in Parts A-C above, that holding is not consistent with this Court's precedents.

E. So Long As The Inventory Search Of Respondent's Car Was Conducted Pursuant To Appropriate Standardized Criteria, The Evidence Found During The Search Was Properly Admitted At Respondent's Trial

Inventory searches of vehicles taken into police custody are not subject to the warrant and probable cause requirements that ordinarily apply to searches. See, *e.g.*, *Colorado* v. *Bertine*, 479 U.S. 367, 371-372 (1987); *South Dakota* v. *Opperman*, 428 U.S. 364, 369-376 (1976). Inventory searches further the government's interests in "the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger." *Id.* at 369 (citations omitted). Those searches are reasonable so long as they are conducted pursuant to "standardized criteria" that adequately constrain the discretion of officers in individual cases. *Florida* v. *Wells*, 495 U.S. 1, 4 (1990).[12]

[12] Those standardized criteria may appropriately leave room for a degree of police discretion "so long as that discretion is exercised * * * on the basis of something other than suspicion of evidence of criminal activity." *Bertine*, 479 U.S. at 375.

In *Cooper* v. *California*, 386 U.S. 58 (1967), the Court upheld an inventory search against Fourth Amendment challenge in circumstances closely resembling those presented here. In *Cooper*, police officers seized and impounded a vehicle pursuant to a state statute authorizing the forfeiture of vehicles used to facilitate the commission of narcotics offenses. *Id.* at 60. Police subsequently conducted a warrantless search of the vehicle and seized incriminating evidence that was introduced in the petitioner's trial for heroin distribution. *Id.* at 58.[13] The Court held that the search did not violate the Fourth Amendment, explaining that "[i]t would be unreasonable to hold that the police, having to retain the car in their custody for [an extended] length of time, had no right, even for their own protection, to search it." *Id.* at 61-62.[14]

[13] The Court's opinion in *Cooper* does not discuss the question whether the officers who searched the vehicle had probable cause to believe that it contained contraband. The State apparently did not seek to demonstrate that probable cause existed, and this Court has subsequently described *Cooper* as a case in which "probable cause to search for the contraband in the vehicle had not been established." *Opperman*, 428 U.S. at 373. The Court's opinion in *Cooper* appears to assume, but does not discuss, the propriety of the earlier warrantless seizure of the automobile.

[14] The Court's decision in *Horton* confirms that an inventory search may properly be conducted following the warrantless seizure of a vehicle found in a public place. The Court in *Horton* stated the general rule that "the seizure of an object in plain view does not involve an intrusion on privacy." 496 U.S. at 141. In a footnote, the Court then explained that "[e]ven if the item is a container, its seizure does not compromise the interest in preserving the privacy of its contents because it may only be opened pursuant to either a search warrant, or one of the well-delineated exceptions to the warrant requirement." *Id.* at 141 n.11 (citations omitted). Immediately following its reference to the "well-delineated exceptions to the warrant requirement," the Court cited

In this case, the district court of appeal upheld the search of respondent's vehicle as a permissible inventory search. Pet. App. A32. The court of appeal noted the requirement that an inventory search must be conducted "pursuant to standard police procedures," and it evidently concluded that the search of respondent's automobile satisfied that requirement. *Ibid.* The Florida Supreme Court did not suggest that the search was impermissible under this Court's inventory search jurisprudence; its suppression of the evidence discovered during the search was based on the perceived impropriety of the earlier seizure. Assuming that the search of the car was conducted pursuant to standardized criteria that adequately constrained police discretion, the evidence seized from the vehicle was properly admitted at respondent's criminal trial.

Bertine (see *ibid.*), which explains and reaffirms the standards governing inventory searches of vehicles in police custody. The Court thus clearly contemplated that a vehicle seized in plain view may properly be made the subject of an inventory search.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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JANUARY 1999

(2)

No. 98-223

In the

Supreme Court of the United States

October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

On Writ of Certiorari
To the Supreme Court of Florida

BRIEF OF THE STATES OF ARKANSAS, CALIFORNIA, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MARYLAND, MICHIGAN, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment require law enforcement officers to obtain a warrant before they may seize a motor vehicle which they have probable cause to believe is subject to forfeiture under state law?

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INTEREST OF THE AMICI CURIAE

Amicus State of Arkansas, together with 26 other amici States, write in support of the Petitioner, State of Florida, urging the Court to reverse the decision of the Florida Supreme Court. All of the amici have statutes permitting the forfeiture of vehicles that have been used in drug transactions, most of which also permit seizure of a vehicle without judicial process where officials have probable cause to believe the vehicle is subject to forfeiture under the law. *See* Appendix. The decision below concluded, however, that the Fourth Amendment requires such forfeiture seizures be made only with a warrant.

The ability to seize vehicles without a warrant where there is probable cause to believe they are subject to forfeiture is an issue of great concern to amici for both legal and practical reasons. First, forfeitures are an effective and important tool in combating criminal activity, particularly drug crimes. Second, the goals served by forfeiture would be unnecessarily impeded by a rule requiring that police officers obtain a warrant to seize a vehicle which they have probable cause to believe is subject to forfeiture – just as the necessity of obtaining a warrant would unnecessarily impede the objectives of the search of a vehicle which police have probable cause to believe contains contraband. Law-enforcement officials need to make decisions about vehicle seizures in light of the practicalities of ongoing criminal investigations and the exigencies present in dealing with automobiles, including the decision whether to obtain a warrant. Because most of the amici's statutes provide police that flexibility, amici join together to defend those statutory schemes and to ask the Court to reverse the lower court's conclusion that the Fourth Amendment erects an obstacle to the important goals served by those statutes.

STATEMENT OF THE CASE

Sometime in late July and early August 1993, police observed and videotaped Respondent White's car being used to conduct illegal drug trafficking. On October 14, 1993, police officers from the Bay County Joint Narcotics Task Force arrested White at work for making an unrelated drug sale. Before arresting White, the officers concluded that his car was subject to forfeiture under the Florida Contraband Forfeiture Act based on the drug trafficking observed in the summer.[1] Consistent with that law, the officers seized White's car from his employer's parking lot without a warrant and took it (and him) to the task force headquarters. In a later inventory search of the car, officials found two rocks of crack cocaine in its ashtray. Pet. App. A-2 & n.2, A-15, A-25, A-26.

Based on that evidence, White was charged with possession of a controlled substance. White challenged the admission of the rocks of cocaine discovered in his car, but the trial court reserved a ruling on his suppression motion until after the jury returned its verdict. After the jury found White guilty and after a subsequent hearing, the trial court denied White's motion. On appeal to the District Court of Appeal of Florida, First District, White challenged the initial, warrantless seizure of his car as a violation of the Fourth Amendment because it was conducted without a warrant or probable cause to search the vehicle. Pet. App. A-3, A-26. Relying on the "automobile

[1] Section 932.702(3) of the Florida Statutes authorizes the state to seize vehicles used "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." Section 932.703(2)(a) provides that "[p]ersonal property may be seized at the time of the violation or subsequent to the violation. . . ."

exception" to the warrant requirement and precedent from other courts (including the Eleventh Circuit), the District Court of Appeal concluded that the police could seize White's car without a warrant and that the forfeiture law required only that they have probable cause to believe the car was subject to forfeiture, not that it currently contained contraband. *Id.* at A-28 to A-32.

Finding an absence of precedent directly on point, the District Court of Appeal certified to the Florida Supreme Court the question whether a warrantless seizure under the "Florida Forfeiture Act" violates the Fourth Amendment. Pet. App. A-33. The Florida Supreme Court answered that question in the affirmative. The court reasoned that the "automobile exception" to the warrant requirement did not apply because the "government had no probable cause to believe that contraband was present in White's car." It further reasoned that no exigency existed because police had White in custody at the time of the seizure. *Id.* at A-9 to A-11.

SUMMARY OF ARGUMENT

I. A. Forfeiture statutes are older than the Nation itself, and statutes enacted by the early Congresses permitted police to search vehicles without a judicial warrant when they had probable cause to believe the vehicles contained contraband subject to forfeiture. Some of these early laws expressly permitted law enforcement officers to seize not only contraband found within the vehicles but also the vehicles themselves. Florida's forfeiture statute not only is part of a long historical tradition, it is commonplace today. Almost all states have a statute that authorizes warrantless seizure of vehicles under a drug-forfeiture law.

B. Warrantless seizures of vehicles which police have probable cause to believe are subject to forfeiture are categorically reasonable, consistent with two longstanding Fourth Amendment doctrines. First, the "plain view" doctrine permits the police to seize items without a warrant when the police are otherwise lawfully present and they have a right of access to the items – as they do with respect to vehicles subject to forfeiture and parked in public places. This Court has made clear that individuals do not retain privacy interests in objects placed in public view, and any possessory interest of the individual is outweighed by the state's compelling interest in forfeiture. The lower court's concern about the absence of exigent circumstances is misplaced. The "plain view" doctrine does not depend upon the presence of exigent circumstances; any delay between the police's obtaining probable cause to seize for forfeiture and the actual seizure has no constitutional significance.

C. Second, the "automobile exception" permits police to act on probable cause without a warrant due to the inherent mobility of automobiles. That same concern dictates reversal here. The compelling interests served by forfeiture statutes would be undermined if police had to obtain warrants before seizing vehicles that are easily movable. On the other side of the balance, as discussed with respect to the "plain view" doctrine, seizure of property subject to forfeiture and placed in public view does not invade any reasonable expectation of privacy.

II. Although no due process question is presented by the case, amici briefly address the issue because the Florida Supreme Court touched upon it in its Fourth Amendment holding. This Court has already held that the due process

requirements of pre-seizure notice and a hearing are not required to seize a vehicle subject to forfeiture, due to the mobility of the vehicle, the significance of the governmental interest, and the fact that the seizure is directed to public purposes. Each of these considerations is satisfied when the police seize, without a warrant, a vehicle which they have probable cause to believe is subject to forfeiture.

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT REQUIRE POLICE TO OBTAIN A WARRANT TO SEIZE A VEHICLE WHICH THEY HAVE PROBABLE CAUSE TO BELIEVE IS SUBJECT TO FORFEITURE

Warrantless seizures by police of items subject to forfeiture – including vehicles – have been understood as reasonable since the Founding. This historical practice is consistent with present Fourth Amendment doctrine, which teaches that (1) police may seize objects that are in "plain view" without a warrant and (2) warrantless seizures of automobiles based on probable cause are permissible given the inherent mobility of automobiles.

A. Since the Founding, Contraband and Vehicles Carrying it Have Been Considered Forfeitable and Subject to Seizure Without a Warrant

Laws passed by the early Congresses provide good evidence of what searches and seizures should be considered reasonable under the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132, 150-51 (1925). Those laws support the constitutionality of the Florida statute. Statutes authorizing

civil forfeiture have a long historical pedigree. As this Court has observed, "almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (footnote omitted). Those forfeiture proceedings were *in rem* actions against the goods themselves, whose jurisdiction depended upon the seizure of the goods. *United States v. Ursery*, 518 U.S. 267, 277 (1996).

More to the point, both before the Founding and at the time of adoption of the Fourth Amendment, forfeiture statutes authorized warrantless searches and seizures of contraband. *See Carroll*, 267 U.S. at 149-53. Thus, in *Carroll*, the Court listed a variety of early federal forfeiture statutes that authorized searches of vessels and the seizure of contraband within them – and emphasized that those statutes did not require law enforcement officers to obtain warrants. *Id.* at 151. The Court contrasted this with the general requirement to obtain a warrant before searching a dwelling, and noted the impracticability of obtaining a warrant to search a movable vessel. *Id.* at 153. Accordingly, "individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband." *United States v. Ross*, 456 U.S. 798, 806 n.8 (1982).

Some early laws expressly permitted (or were interpreted to permit) law enforcement officers not only to search vessels and seize contraband within them without a warrant, but also to seize the vessels themselves without a warrant. *Carroll*, 267 U.S. at 151-53 (containing examples). The exigency that militated in favor of a warrantless search likewise militated in

favor of a warrantless seizure of the vessel. Americans have therefore also long been on notice that, if their vehicles are subject to forfeiture, the vehicles may be seized without a warrant, just as they could be searched without one.

The foregoing demonstrates that even if Florida's contraband forfeiture law were unique today it would be in rather good historical company. But far from unique, Florida's law is not unlike that in nearly all the states, virtually all of which authorize warrantless seizure of vehicles under a drug-forfeiture law. *See* Appendix. The widespread use of such statutory schemes suggests that now, as at the Founding, such seizures are understood to be reasonable. *Cf. Tennessee v. Garner*, 471 U.S. 1, 15-16 (1985) (discussing state practice as relevant to meaning of Fourth Amendment reasonableness). Indeed, the laws authorizing such seizures are, like the case law approving the forfeiture of an innocent owner's property described in *Bennis v. Michigan*, 516 U.S. 442, 448 (1996) (quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921)), "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."

B. The Warrantless Seizure of White's Automobile was Permissible Under a Straightforward Application of the "Plain View" Doctrine

1. Under the "plain view" doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The purpose of the doctrine is to "extend[] to nonpublic places such as the home . . . the police's

longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband." *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (citing *Payton v. New York*, 445 U.S. 573, 586-87 (1980)).

Properly understood, the doctrine is not an exception to the warrant requirement, but reflects the recognition that if "an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton v. California*, 496 U.S. 128, 133 (1990); *see G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351 (1977) (the "seizures of the automobiles . . . took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy"). A seizure may implicate an owner's possessory interest in the article. *Id.* at 134. But as Justice Stevens has explained, "if an officer has probable cause to believe that a publicly situated item is associated with criminal activity, the interest in possession is outweighed by the risk that such an item might disappear or be put to its intended use before a warrant could be obtained." *Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring in the judgment).

The "plain view" doctrine fully applies when the object in plain view is subject to seizure under a forfeiture statute. *See Brown*, 460 U.S. at 737 (for "plain view" doctrine to apply, "it must be 'immediately apparent' to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure") (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)). Any suggestion that an exception to the doctrine should be made for property subject to contraband forfeiture statutes not only is inconsistent with this Court's precedents but ignores the important public purposes underlying those statutes.

Among the important goals of state forfeiture statutes are encouraging property owners to take measures to prevent their property from being used for illegal purposes, abating nuisances, preventing further illicit uses of property, removing dangerous or forbidden goods from circulation, and ensuring that persons do not profit from their illegal acts. *See Ursery*, 518 U.S. at 284. The ability to accomplish those objectives is, however, "dependent upon the seizure of a physical object." *Id.* at 277 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984)).

2. Application of these "well settled" principles, *Payton*, 445 U.S. at 586, resolves this case. Respondent White's car was in his employer's parking lot, a public place; the police were lawfully in that lot when they viewed and then seized the car; and the police had probable cause to believe the car was subject to forfeiture under state law. Accordingly, the "plain view" doctrine applied and the police were not required to obtain a warrant before seizing the car. The outcome is no different than if White had left a bag of cocaine or a gun on the parking lot. By leaving in a public place an object that was, on its face, subject to seizure, White lost any right to demand additional Fourth Amendment safeguards as to its seizure.[2]

Whether a vehicle's statutory classification makes it contraband *per se* or derivative contraband (e.g., as an instrumentality of a crime), does not change the reasonableness of its warrantless seizure. The car owner has still lost any privacy interest against the car's seizure by leaving it in a

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[2] White has not challenged, and the Question Presented does not address, the police's right to conduct the inventory search of White's car or the scope of that search assuming the seizure of the car was valid.

public place, and the car is still lawfully subject to seizure under state law. Moreover, the government has compelling interests in seizing vehicles that served as instrumentalities of crimes. *Calero-Toledo*, 416 U.S. at 687.

The Florida Supreme Court held that the Fourth Amendment required the police to obtain a warrant before seizing White's car because it concluded that no exigent circumstances were established. Pet. App. A-8. The "plain view" doctrine, however, does not depend upon the presence of exigent circumstances. Although exigent circumstances are sometimes necessary to justify a warrantless invasion of a person's privacy, they are not required before the police may seize contraband when there is a "prior justification for an officer's 'access to an object.'" *Brown*, 460 U.S. at 739 (plurality opinion).

The lower court's concern about the delay between the underlying facts supporting the seizure and the actual seizure is misplaced for two additional reasons. First, it rests on the faulty premise that probable cause to seize (a person or contraband) becomes stale over time. Although the Fourth Amendment protects a seized person by the requirement of a prompt judicial determination that a warrantless arrest is founded upon probable cause, *see County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991), even that protection accommodates the practicalities of law enforcement. *Id.* Just as "[t]here is no constitutional right to be arrested," because "no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so," *United States v. Lovasco*, 431 U.S. 783, 792 & n.13 (1977) (internal quotations and citations omitted), there is no Fourth Amendment right to speedy seizures.

Second, to criticize police for delays in seizing either suspects or contraband misapprehends the nature of ongoing criminal investigations. Few criminal investigations, if any, exist in isolation, but are often connected to other investigations and many officers. Whether by design or circumstance, police may either need or happen to make an arrest or other seizure at a time removed from that when the underlying circumstances supporting probable cause first arose. The time frame involved in this case, a matter of months, cannot raise any serious constitutional concerns in light of the practicalities of law enforcement.[3]

C. The Exigency Underlying the "Automobile Exception" to the Warrant Requirement Also Justifies the Warrantless Seizure of White's Automobile

1. Even where, unlike here, police conduct implicates privacy concerns, this Court has not required police to obtain warrants in all circumstances. Because reasonableness is the touchstone of the Fourth Amendment, the Court has approved warrantless searches in a variety of circumstances where it is generally reasonable for the police not to obtain a warrant. *See*,

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[3] The Court has suggested that some privacy or possessory interests might make the length of time a vehicle is kept by police before being searched unreasonable. *See United States v. Johns*, 469 U.S. 478, 487 (1985). It is also not inconceivable that the length of time a vehicle *remains seized* before being forfeited might implicate similar interests, *see United States v. Jacobsen*, 466 U.S. 109, 124 & n.25 (1984), although such interests are *de minimis* at the time of seizure. *See Brown*, 460 U.S. at 739 (plurality opinion) (describing interests in a contraband object as "merely those of possession and ownership"). Neither of these concerns has been raised in this case, and neither suggests any basis to conclude that an initial warrantless seizure based on probable cause would be unreasonable.

e.g., *New York v. Belton*, 453 U.S. 454, 460-61 (1981) (reasonable to search passenger compartment of vehicle incident to arrest); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973) (reasonable to search arrestee incident to arrest); *Carroll*, 267 U.S. at 153 (reasonable to search automobile where police have probable cause to believe that it contains contraband). In any such case, the balance is between "the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (internal quotation marks and citation omitted).

Even were we to assume that the police's "plain view" seizure of White's automobile invaded his privacy interests, the balance would still favor the police acting without a warrant. Several of the exceptions to the warrant requirement sanctioned by this Court arise from concerns specific to moving vehicles. *See, e.g., Carroll*, 267 U.S. at 153 (automobile exception); *Ross*, 456 U.S. at 825 (when police conduct a warrantless search under *Carroll*, they may search all compartments and containers within the car). In particular, the Court has recognized "the impracticability of securing a warrant in cases involving the transportation of contraband goods" and "that an immediate intrusion is necessary if police officers are to secure the illicit substance." *Ross*, 456 U.S. at 806-07 (footnote omitted). This exigency is fully present when police seek to seize an automobile that is subject to a state's forfeiture law.

To begin with, as noted in subsection B above, the public interest in contraband forfeiture statutes is significant. That interest would be jeopardized by a warrant requirement when the object to be seized is an automobile. Automobiles, by their nature, are property that is "of a sort that could be removed to

another jurisdiction . . . or concealed." *Calero-Toledo*, 429 U.S. at 679. Any delay occasioned by securing a warrant once the police have lawfully come across a vehicle subject to forfeiture will place the seizure at risk. This is true regardless of the location of the vehicle or its owner at the time of the seizure. The Court does not "distinguish between 'worthy' and 'unworthy' vehicles," *California v. Carney*, 471 U.S. 386, 394 (1985) – all vehicles are susceptible to being "quickly moved." *Carroll*, 267 U.S. at 153; *see also Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970) (search of vehicle founded on probable cause may be conducted on spot or later at station house). Thus, the Florida Supreme Court's conclusion, Pet. App. A-10, that White's arrest removed any exigency was incorrect; White's car was still a "fleeting target" of seizure. *Chambers*, 399 U.S. at 52.

Moreover, when police seize a vehicle subject to forfeiture as contraband under state law, their probable cause determination is especially reliable because it is typically based on the fruits of a prior valid search or arrest or, at the very least, on information that would support a valid search or arrest. For example, the facts supporting seizure in this case included eyewitness and videotape evidence that the car was used in drug transactions. Pet. App. A-25 to A-26. Indeed, it is hard to conceive that vehicles will ever be seized under the Florida forfeiture statute in circumstances less certain than those that would support probable cause to search for contraband in the first instance under the automobile exception.

2. To this point, we have assumed in this subsection that the police's seizure of White's car invaded his privacy interests. As demonstrated in the discussion of the "plain view" doctrine, however, the seizure did not in fact invade any such interests.

A person does not have a legitimate expectation of privacy in an object placed in public view, as White's car was.[4] And any possessory interest White retained "must yield to society's interest in making sure that the contraband does not vanish during the time it would take to obtain a warrant." *Brown*, 460 U.S. at 749-50 (Stevens, J., concurring in the judgment).

The Florida Supreme Court may be correct in stating (Pet. App. A-9) that the automobile exception does not literally apply here – the police did not conduct a warrantless search of a car based on probable cause to believe the car contained contraband. But the fact that the police conducted a seizure, not a search, only strengthens the validity of the police's acting without a warrant because no privacy interests were invaded. It would be anomalous to require a warrant to seize a vehicle when no warrant is required in analogous circumstances to search it. *See* 3 Wayne R. LaFave, *Search & Seizure* §7.3(b), at 516 (3d ed. 1996). Moreover, there is no reason why warrantless police actions are less justified when the probable cause pertains to the car itself as opposed to contraband within a car.

Other situations where police are permitted to act without warrants further show the anomalous nature of the lower court's ruling. First, police may, without a warrant, search passenger compartments incident to arrest and conduct inventory searches of impounded cars – without any probable cause to believe contraband will be found. *Belton*, 453 U.S. at

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[4] As a general proposition, of course, citizens' privacy interests in automobiles are diminished considerably due to both their mobility and the great amount of noncriminal official contact to which they are subject by extensive regulation and use in public. *See Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973).

460; *South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976). It makes no sense to impose a stricter rule when there is probable cause with respect to the very object being seized. Second, police may arrest persons in public places without a warrant. *See United States v. Watson*, 423 U.S. 411, 418-24 (1976). The lower court decision would have the anomalous consequence of making it easier to seize people than to seize their property.

In the end, whatever limits may be found from other constitutional sources (such as the Due Process Clause), states surely do not violate the Fourth Amendment through drug contraband-forfeiture laws applied to vehicles any more than Congress exceeded it with respect to contraband liquor as in *Carroll*. History and doctrine lead to the same conclusion: the numerous state statutes across the country that authorize warrantless seizures of automobiles that are subject to forfeiture are consistent with the Fourth Amendment.

II. A DUE PROCESS ANALYSIS WOULD NOT TURN ON THE USE OF A WARRANT

Although the Question Presented asks only a Fourth Amendment question, the Florida Supreme Court reached its holding in part by conflating notions of due process and the Fourth Amendment. Pet. App. A-7 to A-8. Because that court did so, amici briefly address due process. This Court's two principal authorities on point suggest that police serve any due process interests at stake in the seizure of a vehicle subject to forfeiture equally well whether they act on probable cause alone or with a warrant.

As to the seizure of real property, the Court has concluded that the Fourth Amendment warrant requirement is *in*adequate to protect due process interests. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 50-52 (1993). On the other hand, in *Calero-Toledo*, the Court held that the due process requirements of pre-seizure notice and a hearing are not required to seize a vehicle, there a yacht, due to the mobility of the vehicle, the significance of the governmental interest, and the fact that the seizure was pursuant to a statute, as opposed to a writ of replevin meant to accomplish private ends. 416 U.S. at 679.

The Court's reference to the statute, which required some judicial process, in no way suggested that due process requires the government to obtain a warrant before seizing vehicles subject to forfeiture. Rather, the statute, as noted, simply confirmed in that case that the seizure served a public purpose – which was surely the case here as well.[5] All three concerns identified by the Court in *Calero-Toledo* supporting seizure without a hearing or notice are served whether the means of seizure is judicial process or simply a probable-cause determination. The public interests served by seizure and forfeiture (*in rem* jurisdiction and prevention of illicit use, to name two) and the possibility that they will be frustrated by pre-seizure delay due to the mobility of vehicles are certainly the same whether a warrant is obtained or not. In addition, with or without a warrant, a forfeiture seizure is made to serve public goals, not the private interests of a lien holder. The

[5] *Calero-Toledo* addressed Puerto Rico law, which, unlike the laws of most amici, required the use of process. P.R. Laws Ann. tit. 24, §2512(b); *see* 416 U.S. at 679-80 n.4; Appendix.

police's seizure of White's car was fully consistent with due process principles.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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January 11, 1999

APPENDIX

APPENDIX

Statutes that Provide for the Forfeiture of Vehicles and Seizure Without a Warrant

Ala. Code §20-2-93(a)(5) & (b)(4) (Repl. 1997).
Alaska Stat. §§17.30.110(4) & 17.30.114(a)(3) (1998).
Ariz. Rev. Stat. §13-4305A.3(c) (Cum. Supp. 1998).
Ark. Code Ann. §5-64-505(a)(4) & (b)(5) (Repl. 1997).
Cal. Health & Safety Code §§ 11470(c) & 11471(d) (Cum. Supp. 1998).
Colo. Rev. Stat. §§16-13-504(1) (contraband) & §18-18-410 (nuisance) (1998) .
Conn. Gen. Stat. Ann. §§ 21a-246(d)(4) & 54-33g (nuisance) (West 1998).
Del. Code Ann. tit. 16, §4784(a)(4) & (c)(4) (Repl. 1995).
D.C. Code Ann. §33-552(a)(4) & (b) (Repl. 1998).
Fla. Stat. Ann. ch. 932.701-.707 (West 1998).
Ga. Code Ann. §16-13-49(d)(2), (3) & (g)(2) (1996).
9 Guam Code Ann. §67.80(a)(4) & (b)(4) (1996).
Haw. Rev. Stat. §329-55(a)(4) & (b)(4) (Repl. 1996) & §712A-6(1)(c)(iv) (Supp. 1998).
Idaho Code §37-2744(a)(4) & (b)(4) (1994).
720 Ill. Comp. Stat. 570/505(a)(3) & (b)(4) (Supp. 1998).
Ind. Code Ann. §34-24-1-1(a)(1) & -2(a)(1) (Supp. 1998).
Iowa Code Ann. §809A.4.2.a & .6.2 (Supp. 1998).
Kan. Stat. Ann. §65-4156(a)(4) & (b)(3) (1992).
Ky. Rev. Stat. Ann. §218A.410(1)(h) & .415(1)(d) (Repl. 1995).
La. Rev. Stat. Ann. tit. 40, §2604(2)(b) (1992) & §2606A & B (Supp. 1998).
Me. Rev. Stat. Ann. tit. 15, §§5821.4 & 5822.6.D (Supp. 1998).

Md. Ann. Code art. 27, §297(b)(4) & (d)(1)(iv) (Supp. 1998).
Mass. Gen. Laws Ann. ch. 94C, §47(a)(3) & (f)(1) (1995).
Mich. Comp. Laws Ann. §§333.7521(1)(d) & 333.7522(d) (West 1992).
Minn. Stat. Ann. §§609.5311(Subd. 2) & 609.531(Subd. 4)(3) (Supp. 1998).
Miss. Code Ann. §41-29-153(a)(4) & (b)(4) (1993).
Mo. Ann. Stat. §513.607.1 (Supp. 1998).
Mont. Code Ann. §§ 44-12-102(1)(d) & 44-12-103(2)(d) (West 1998).
Neb. Rev. Stat. Ann. §28-431(1)(f) & (2) (Supp. 1998).
N.H. Rev. Stat. Ann. §318-B:17-b-I(b) & I-b(b) & (d)(1995).
N.J. Stat. Ann. §2C:64-1a(2) & b(2) (West 1995).
N.M. Stat. Ann. §§30-31-34D & 30-31-35B(4) (Repl. 1997).
N.Y. Pub. Health §3388.1(c) (McKinney 1993).
N.C. Gen. Stat. §90-112(a)(4) & (b)(1) (1997).
N.D. Cent. Code §19-03.1-36.1.e & -36.2.d (Supp. 1997).
Ohio Rev. Code Ann. §2925.13(A)(2) & (C)(1)(c), (d) (1997).
Okla. Stat. tit. 63, §§2-503A.4 & 2-504.4 (Supp. 1999).
Or. Rev. Stat. §§475A.020(4) & 475.035(2)(b) (1997).
42 Pa. Cons. Stat. Ann. §6801(a)(4) & (b)(4) (Rev. Supp. 1998).
P.R. Laws Ann. tit. 24, §2512(a)(4) (1994).
R.I. Gen. Laws §21-28-5.04.2(b) & (c)(3)(D) (Repl. 1989 & Supp. 1998).
S.C. Code Ann. §44-53-520(a)(4) & (b)(4) (Supp. 1997).
S.D. Codified Laws §§34-20B-70(4) & 34-20B-75(4) (1998).
Tenn. Code Ann. §53-11-451(a)(4) & (b)(4) (Supp. 1998).
Tex. Code Crim. P. Ann. arts. 59.01(2) & 59.03(b)(4) (West Supp. 1999).
Utah Code Ann. §58-37-13(2)(e) & (3)(a)(iv) (Repl. 1998).
Vt. Stat. Ann. tit. 18, §§4241(a)(6) & 4242(b)(1) & (3) (Supp. 1997).

Va. Code Ann. §§18.2-249.A(i) & 19.2-386.2 (Michie 1996).
V.I. Code Ann. tit. 19, §623(a)(4) & (b)(4) (1998).
Wash. Rev. Code Ann. §69.50.505(a)(4) & (b)(4) (1997).
W. Va. Code Ann. §60A-7-703(a)(4) & (b) (Repl. 1997).
Wis. Stat. Ann. §961.55(1)(d) & (2)(d) (Supp. 1997).
Wyo. Stat. Ann. §§35-7-1049(a)(v) & (b)(i), (iii) (1997).

(9)

No. 98-223

In The

Supreme Court of the United States

October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the United States Constitution require law enforcement officers to obtain a judicially authorized warrant before they may seize a motor vehicle which they have probable cause to believe is subject to forfeiture under state law?

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No. 98-223

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE OF FLORIDA, *Petitioner,*

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TYVESSEL TYVORUS WHITE, *Respondent.*

On Writ of Certiorari to
the Supreme Court of Florida

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

This *amicus curiae* brief is submitted by on behalf of Respondent, Tyvessel Tyvorus White. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than *amicus curiae* and its counsel authored this brief in whole or in part; no person or entity, other than *amicus curiae*, its members, or its counsel, have made monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. One of NACDL's objectives is to ensure that statutes are construed and applied in accordance with the Constitution.

NACDL has long been troubled by the expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are used by state and federal prosecutors to inflict punishment and deprive individuals (including innocent persons) of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants.

The Florida statute at issue in this case provides that property used in violation of the Florida Contraband Act may be seized and forfeited. The statute does not require that such seizures be made pursuant to a warrant. The parallel federal civil forfeiture statute, 21 U.S.C. §881, expressly authorizes the seizure of property *without prior judicial process* "when the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter." 21 U.S.C. §881(b)(4). We agree

with the Supreme Court of Florida below, and those decisions of several federal courts of appeals, which hold that there is no "forfeiture seizure" exception to the Fourth Amendment warrant requirement. NACDL advocates this position to preserve the right of the people to be free from unreasonable searches and seizures. Thus, NACDL has a vital interest in the outcome of this case, and urges the Court to affirm the decision below.

SUMMARY OF ARGUMENT

Subject to only a few specifically established exceptions, seizures conducted outside the judicial process are per se unreasonable. There is no "forfeiture exception" to the warrant requirement. There were no exigencies requiring prompt action, and neither the automobile exception nor the plain view exception can justify the warrantless seizure in this case. The seizure of Respondent's automobile clearly infringed on his privacy interest as well as his possessory interest in the vehicle.

Moreover, the Fourth Amendment does not provide the sole measure of constitutional protection to property owners in forfeiture cases. Where the government seizes property not to preserve evidence of wrongdoing, but to assert ownership and control over the property, the government must also comply with the Due Process Clauses of the Fifth and Fourteenth Amendments.

Analyzing the reasonableness of the seizure in light of the post-seizure procedures available and the Government's direct pecuniary interest in the outcome of forfeiture proceedings leads to but one conclusion: the seizure in this case was constitutionally impermissible.

ARGUMENT

I. THE PROTECTION OF PRIVATE PROPERTY RIGHTS IS CENTRAL TO OUR HERITAGE.

A brief review of the importance of property rights in our society is indispensable to a resolution of the issues before the Court.

Throughout the history of western democratic societies, the importance of private property as a "concomitant to liberty" has been widely recognized. See, John Locke, THE SECOND TREATISE ON CIVIL GOVERNMENT, ¶¶ 123-42.[2] Indeed, this Court has recognized that "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). Likewise, as recently observed by this Court, "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61, 114 S.Ct. 492, 505, 126 L.Ed.2d 490 (1993).

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[2] The Founders understood that private property was a fundamental aspect of personal liberty and, moreover, a major goal of the Revolution itself. In the Declaration of Independence, Jefferson, borrowing from John Locke, asserted that the goals of the nation were "life, liberty, and the pursuit of happiness." Locke's language, of course, had been "life, liberty, and property." Jefferson rightly understood that property was a part of both liberty and the fundamental happiness of the people. The demand for a Bill of Rights naturally included the demand for the protection of property, which the Founders regarded as "the guardian of every other right." James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: THE CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992).

The nature and quality of a citizen's freedom and security relates directly to his or her ability to own property and to be secure from governmental intrusion therein. "[I]n a free government almost all other rights would become worthless if the government possessed power over the private fortune of every citizen." *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 41 L.Ed. 979 (1897); Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 276-77 (1988).

II. THE DECISION OF THE FLORIDA SUPREME COURT IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THE COURT.

Petitioner argues that the Florida Supreme Court's decision conflicts with *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), and *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).[3] This argument ignores critical factual and legal distinctions between these cases and the case at bar.

The Court's decision in *Carroll* reviewed the action of law enforcement officers in stopping and searching a vehicle suspected to be carrying contraband. *Carroll* set the bar for probable cause to search in such circumstances. The Court compared automobiles with vessels, and held that they could be searched without warrants. But *Carroll* did not consider the issue presented here: Whether in the absence

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[3] The question presented in Florida's petition for writ of *certiorari* was "[W]hether the decision of the Florida Supreme Court . . . conflicts with decisions of the Court in *Carroll v. United States, Calero-Toledo v. Pearson Yacht Leasing*, and *Cooper v. California* . . ."

of exigent circumstances the warrantless seizure of an automobile for civil forfeiture is constitutionally permissible. *Carroll* addressed only the constitutional requirements for stopping and searching a vehicle believed to be carrying contraband. Although *Carroll* is a bedrock case for the stop and search of an automobile and the requisite probable cause for those actions, it provides no guidance for the analysis of the validity of the seizure of a vehicle for civil forfeiture.

Calero-Toledo is similarly distinguishable. That decision addressed the due process considerations of seizure without prior notice or hearing under a Puerto Rican forfeiture statute. The Court held that due process was not offended under such circumstances because of the movable nature of the yacht.[4] *Id.* at 2089, 2090. *Calero-Toledo* specifically left open "the question whether the Fourth Amendment warrant or probable-cause requirements are applicable to seizures under the Puerto Rican statutes." *Id.* at 2090 at n. 14.

Nor does the Florida Supreme Court's decision conflict with this Court's decision in *Cooper,* where the Court considered the admissibility of contraband seized from a vehicle which police had impounded upon the defendant's arrest. *Id.* at 789. The Court in that case reviewed only the validity of an inventory search conducted after the impoundment of the vehicle. *Cooper* did not consider the validity of the seizure itself and, in fact, assumed that the

[4] Central to the Court's analysis was the fact that a yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed or concealed, if advance warning of the confiscation were given." *Calero-Toledo, supra,* 416 U.S. at 679. Of course, those concerns simply do not arise from the issuance of an *ex parte* judicial warrant.

seizure was lawful for purposes of the opinion. *Id.* at 791. Thus, *Cooper* did not address the heart of the appeal at bar, the lawfulness of a seizure for civil forfeiture.

Moreover, *Cooper* is factually distinguishable from the instant case. *Cooper* emphasized that the police officers who seized Cooper's car were required to do so under a California statute, and that the seizure was made in order to preserve the automobile for evidence. *Id.* at 791. In the instant case, however, the officers were not required to seize the automobile. They did so either to facilitate the forfeiture or, perhaps, to allow them to search the vehicle without concern for the probable cause requirements of the Fourth Amendment. Such a circumstance was not addressed in *Cooper.*

III. NO RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT EXISTED WHICH WOULD JUSTIFY THE WARRANTLESS SEIZURE IN THIS CASE.

Subject to only a few specifically established exceptions, searches and seizures conducted outside the judicial process, without the prior approval of a judge or magistrate, are per se unreasonable. *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d. 575, (1967). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation make the course imperative.' [T]he burden is on those seeking the exemption to show the need for it" (Citations omitted). *Coolidge v. New Hampshire,* 403 U.S. 443, 455, 91 S.Ct 2022, 29 L.Ed.2d 564 (1971). There is no "forfeiture exception" to the warrant requirement. *United States v. Lasanta,* 978 F.2d 1300, 1305 (2nd Cir. 1992).

It is uncontested that Respondent's vehicle was seized without a warrant. Petitioner also concedes that the seizure was not incident to Respondent's arrest. Moreover, the Court below found that there were no exigent circumstances justifying the need for prompt action. Indeed, the alleged act giving rise to the forfeiture had occurred more than two months prior to the seizure, and at the time the vehicle was seized, it was lawfully parked and locked, and Respondent had already been arrested and the keys found in his pocket. Nevertheless, Petitioner relies on an expansive and strained reading of prior decisions of this Court, which are clearly inapposite, to defend the unlawful seizure.

A. The "Automobile Exception" Does Not Apply.

The thrust of Petitioner's argument is that the so-called automobile exception justifies the warrantless seizure in this case. However, the automobile exception is not a blanket exception for all vehicles at all times. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge, supra,* 403 U.S. at 461-62. Rather, the exception finds its underpinnings in the inherent mobility of automobiles. The Court summarized the exception in *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970):

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an *automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.* Hence, an immediate search is constitutionally permissible.

Id., 399 U.S. at 51 (emphasis supplied).

In the case at bar, the Supreme Court of Florida found that there were no exigent circumstances. "[T]he absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here . . . There was simply no concern presented here that an opportunity to seize the vehicle would be missed because of the mobility of the vehicle." *Florida v. White,* 710 So.2d 949, 953. That determination is amply supported by the record, and should not be disturbed.

B. The "Plain View" Exception Does not Apply.

The United States and the States Attorney Generals attempt to support the warrantless seizure based on the plain view exception. However, that doctrine applies only to contraband and evidence of a crime, and is clearly inapplicable to the facts at bar.

What all of this Court's plain view cases have in common, and what is missing in this case, is that the

property seized was either "contraband" or "incriminating evidence." *Horton v. California,* 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) is instructive on this point.[5] Focusing on the nature of the property to be seized, the Court observed that "not only must the item be in plain view; its incriminating character must also be 'immediately apparent.'" *Id.*, 496 at 136 (citing *Coolidge, supra,* 403 U.S. at 466). See also, *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (it is "well settled that *objects such as weapons or contraband* found in a public place may be seized by the police without a warrant") (emphasis supplied).

Recognizing the obvious limitations of the plain view doctrine, Petitioner attempts to characterize Respondent's vehicle as contraband. But that cramped view has been previously rejected by this Court. As the Court observed in *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170 (1965): "[T]here is nothing even remotely criminal in possessing an automobile." More recently, in *Austin v. United States,* 509 U.S. 602, 621, 113 S.Ct. 2801, 2811, 125 L.Ed.2d 488 (1993), referring to a vehicle seized for forfeiture because it had been used to facilitate a drug transaction, the Court observed: "[T]he government's attempt to characterize th[is] propert[y] as 'instrument[]' of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth sedan as contraband."

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[5] The specific question addressed by the Court in Horton was "[W]hether the warrantless seizure of *evidence of a crime* in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent." 496 U.S. at 128 (emphasis supplied).

The United States persists in trying to squeeze within the confines of the plain view doctrine by shrewdly utilizing the description "susceptible to seizure" interchangeably with "incriminating nature of the item" or "evidence of a crime." See, *e.g.*, Brief of United States at 18 ("The automobile's *susceptibility to seizure* was 'immediately apparent' within the meaning of this Court's decisions"). But Respondent's vehicle was not seized because it was evidence of a crime (clearly it was not); it was seized because the state intended to forfeit the vehicle in a separate civil proceeding. As such, it clearly falls outside the category of objects which may be seized without a warrant under the plain view doctrine.

C. The Seizure Infringed on Respondent's Privacy Interests.

Finally, the United States attempts to justify the warrantless seizure of Respondent's vehicle by arguing that the seizure merely infringed upon Respondent's possessory interest which, it argues, is not entitled to the same protections as privacy interests. See, *e.g., Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). That argument is, at best, specious, and ignores the reality of what inevitably and invariably occurs following a seizure of a vehicle. See, *e.g., Illinois v. Lafayette,* 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983), upholding inventory searches of seized vehicles.

Although Respondent admittedly had no privacy interest in the *outside* of his vehicle, which was parked in a public place, he most assuredly had a privacy interest in the *contents* of the locked vehicle, which were not exposed to

the public.[6] Thus, a fortiori, it is clear that Respondent's privacy interests were both implicated and infringed upon by the seizure and subsequent search of his vehicle.

V. WHERE THE GOVERNMENT SEIZES PROPERTY NOT TO PRESERVE EVIDENCE OF WRONGDOING, BUT TO ASSERT OWNERSHIP AND CONTROL OVER THE PROPERTY ITSELF, THE GOVERNMENT MUST ALSO COMPLY WITH THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS.

This Court has previously rejected Petitioner's argument that the Fourth Amendment provides the sole measure of constitutional protection that must be afforded to property owners in forfeiture proceedings. *Good, supra,* 510 U.S. at 51, 114 S.Ct. at 500 (1993) ("Though the Fourth Amendment places limits on the Government's power to seize property for purposes of forfeiture, it does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings"). Thus, the Court has held that where, as here, the government seizes property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself, the government must also comply with the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.*, at 52.

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[6] During an inventory search following the seizure, the police found two rocks of crack cocaine which were wrapped in paper and placed inside a paper bag, which was placed inside the vehicle's ashtray. The cocaine was not visible from any public vantage point. Joint Appendix, at A-27. Moreover, even if the police had not conducted an inventory search following the seizure, they obtained the keys from Respondent and drove the car to the police station. The act of entering the car and driving it away necessarily infringed on Respondent's privacy interest in the interior of the vehicle.

The Court in *Good* also rejected the argument advanced by Petitioner here that requiring a warrant for the seizure of property for forfeiture elevates the protections of an accused's property over that of his person,[7] noting that the arrest or detention of a person occurs as part of the criminal process, "where other safeguards ordinarily ensure compliance with due process." *Id.*, at 50. Citing its earlier decision in *Gerstein v. Pugh,* 450 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Court further observed that exclusive reliance on the Fourth Amendment is appropriate in the arrest context, because the Amendment "was tailored explicitly for the criminal justice system," and its "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person *or property* in criminal cases." *Id.*, at 125, n. 27 (emphasis supplied). Finally, the Court noted that the protections afforded during an arrest and initial detention of a person are "only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." *Ibid.*

A. The Reasonableness of the Warrantless Seizure in this Case Must be Assessed in Light of the Post-Seizure Procedures Available and the Government's Direct Pecuniary Interest in the Outcome of the Proceeding.

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[7] As Justice Powell cogently observed in his concurring opinion in *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 820 (1976), "There is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers. See, N. Lassen, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 79-105 (1937)." *Id.*, 423 U.S. at 429.

1. The post-seizure procedures available.

There is a stark contrast between the procedures available to a defendant in a criminal case and those available to a claimant in a civil forfeiture proceeding. For example, a person is entitled to be brought before a magistrate within 48 hours following an arrest, at which time the government bears the burden of establishing probable cause for the arrest and continued detention. *See, e.g., Riverside County v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). Similarly, a defendant may immediately move the appropriate court for return of property which has been unlawfully seized. See, *e.g.,* Fed.R.Crim.P. 41(e).

On the other hand, claimants in most civil forfeiture proceedings are afforded only minimal protections.[8] There is no right to a prompt post-seizure judicial probable cause hearing in forfeiture proceedings brought pursuant to the federal drug forfeiture statute (21 U.S.C. §881).[9] Indeed,

[8] The Florida Contraband Forfeiture Act provides more protections than most state forfeiture statutes. For example, it provides that a person may request a post-seizure probable cause hearing. The request must be made within 15 days after receipt of the notice of seizure. The hearing, if requested, must then be held within 10 days after the request for hearing is made, "or as soon thereafter as is practicable." Fla. Stat. Ann. §932.703(2)(a) (Supp. 1999). Thus, even under this statute it is possible that the post-seizure hearing may not occur for 25 days, or even longer, after notice of seizure.

[9] Unless a claimant in a federal drug forfeiture presents a timely claim, which must be accompanied by a cost bond equal to 10% of the value of the seized property (not less than $250 nor more than $5,000), the case will never be filed in court. 19 U.S.C. §1608. In such cases, there would never be an opportunity for judicial review of the police

the federal forfeiture statute does not contain a statutorily mandated time limit for giving notice of the seizure to interested persons. Moreover, the federal statute does not impose a time limit on when the government must file a civil complaint for forfeiture following receipt of a claim and cost bond.[10] In its most recent decision on the subject, this Court held that a delay of 18 months in filing a civil forfeiture complaint did not violate the claimant's right to due process of law. *United States v. $8,850 in United States Currency,* 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983).

Further exacerbating the problem, once the government serves an administrative notice of seizure and intended forfeiture, courts are divested of jurisdiction to hear a motion for return of property pursuant to the criminal rules.[11]

officer's probable cause determination. Moreover, even if the owner files a claim and cost bond, the government is under no statutory obligation to promptly commence a judicial forfeiture proceeding.

[10] The federal drug forfeiture statute does contain expedited procedures for seized conveyances. 21 U.S.C. §888. However, even these procedures do not require the government to commence a judicial proceeding for up to 60 days following receipt of a claim and cost bond. Of course, the claim and cost bond can only be filed after receipt of proper notice, which can take up to an additional 60 days. Thus, even under these "expedited" procedures, it would likely be more than four months before a property owner could challenge the police officer's probable cause determination in court.

[11] See, *e.g., United States v. One 1987 Jeep Wrangler,* 972 F.2d 472 (2nd Cir. 1992); *Industrias Cardoen, Ltd. v. United States,* 983 F.2d 49 (5th Cir. 1993); *Shaw v. United States,* 891 F.2d 602 (6th Cir. 1989); *United States v. Elias,* 921 F.2d 870 (9th Cir. 1990); *Frazee v. IRS,* 947 F.2d 448 (10th Cir. 1991); *United States v. Castro,* 883 F.2d 1018 (11th Cir. 1989); *United States v. Price,* 914 F.2d 1507 (D.C. Cir. 1990).

Thus, once the administrative notice is issued, access to the courts to contest probable cause is denied until the government commences the judicial forfeiture proceeding. Consequently, there may be no opportunity for judicial review of the seizing officer's probable cause determination for many months, or even years, if ever.

This Court has previously recognized that even the availability of a post-seizure hearing may be no recompense for losses caused by erroneous seizures. The Court observed in *Good*

> Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure. And even if the ultimate judicial decision is that . . . the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have presented." [Connecticut v.] Doehr, 501 U.S. [1], at 15, 111 S.Ct. [2015], at 2115.

510 U.S. at 56. Consequently, a pre-seizure warrant based upon a judicial determination of probable cause is the only practical procedural safeguard.

B. The Government has a Direct Pecuniary Interest in the Outcome of the Proceeding.

This Court, which acknowledged the government's direct pecuniary interest in the outcome of forfeiture proceedings in *Good*, 510 U.S. at 56, has traditionally recognized the need for special scrutiny where the

government stands to benefit financially from the imposition of sanctions as a result of criminal conduct. *See, Harmelin v. Michigan,* 501 U.S. 957, 979, n. 9, 111 S.Ct. 2680, 2693, n. 9, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J., ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit").

Given the government's direct and substantial pecuniary interest in civil forfeiture proceedings, a governmental seizure of property without a prior judicial determination of probable cause should be allowed only upon a clear showing of extraordinary circumstances. As Justice Jackson wrote a half-century ago concerning the preference for a warrant: "[T]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of usual inferences which reasonable men draw from evidence. Its protection consists of requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 13, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). The protection of a pre-seizure warrant is even more important here, where the government has a direct financial interest in the outcome of the proceeding.

Consideration of these factors utilizing the three-part inquiry set forth in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) also provides guidance.[12]

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[12] The *Mathews* inquiry was utilized by this Court in *Good* to determine whether due process required notice and an opportunity to be heard prior to the seizure of real property. The Court had previously held that no such notice was required for the seizure of a yacht, because of the inherent mobility of the property and the possibility that it could

1. The Property Owner's Interest. Under this prong, the court must evaluate the owner's interest in protecting his vehicle from seizure. In today's mobile society, this interest is clearly significant. Moreover, when property rights are at issue, so too are liberty rights. As Justice Stewart wrote:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without he other. That rights in property are basic civil rights has long been recognized.

Lynch, supra, 405 U.S. at 552.

2. The Risk of Erroneous Deprivation. This Court has emphasized that, especially where a party has a pecuniary interest in the outcome, "making realistic assessments" of the merits of a case based on *ex parte* showings is difficult because these showings can be "one-sided, self-serving, and conclusionary." *Doehr,* 111 S.Ct. at 2114. A fortiori, leaving the determination to a police officer who ultimately stands to gain from the forfeiture,

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be removed from the jurisdiction or destroyed or concealed if advance warning of the seizure were given. Those concerns, of course, are not implicated by a judicially authorized warrant, which is obtained *ex parte*.

rather than to a neutral and detached magistrate, substantially increases the likelihood of an erroneous deprivation. This is especially true given the absence of a prompt post-seizure hearing to contest the probable cause determination. See discussion, *supra,* at 16-17.

3. The Government Interest. The governmental interest to be considered is the government's interest in seizing property without a warrant, not the government's interest in forfeiting property. See, *Good,* 510 U.S. at 56. The government's interest in seizing vehicles to deter illegal drug trafficking would not be affected by requiring a judicially approved warrant for seizure. With a warrant, the government would still be able to seize property, provide a significant deterrent to drug trafficking, and enhance revenue for law enforcement, while at the same time protecting the property owner from an erroneous deprivation of property rights. Moreover, requiring a warrant would not place any additional fiscal or administrative burdens on law enforcement.

It is worth noting here that federal government, as a matter of *policy,* encourages the use of pre-seizure warrants. Brief of United States, at n. 1. Significantly, the Solicitor General does not even suggest, let alone argue, that this policy has lead to any hardships or "missed opportunities" for agents in the field to successfully seize property for forfeiture. The federal government's experience thus flies in the face of Petitioner's claim that requiring law enforcement to obtain a pre-seizure warrant where no exigent circumstances exist will lead to an "incalculable" additional burden. Petitioner's Brief at 22. Indeed, it seems odd that the Florida Attorney General, who is the state's top law enforcement officer, considers the constitution to be a burden and a "arbitrary roadblock" to effective police investigation.

Ibid. Let no one be fooled, however. Should this Court determine that warrantless seizures of vehicles for forfeiture are permissible in the absence of any recognized exception to the warrant requirement, the government's "policy" encouraging the use of warrants will become a footnote in history before the ink is dry on the Court's opinion.

The balance of the *Mathews* factors in this context is straightforward. In the absence of exigent circumstances, the Fifth and Fourteenth Amendment Due Process Clauses require a judicially approved warrant to seize a vehicle for purposes of civil forfeiture, independent of the protections guaranteed by the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted.

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